| No. 17-9572 *** CAPITAL CASE *** | |
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| Title: | Curtis Giovanni Flowers, Petitioner<br>v.<br>Mississippi |
| Docketed: | June 26, 2018 |
| Linked with 17A1205 | |
| Lower Ct: | Supreme Court of Mississippi |
| Case Numbers: | (2010-DP-01348-SCT) |
| Decision Date: | November 2, 2017 |
| Rehearing Denied: | February 22, 2018 |
| Questions Presented | |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| Apr 30 2018 | Application (17A1205) to extend the time to file a petition for a writ of certiorari from May 23, 2018 to July 7, 2018, submitted to Justice Alito.<br><br>**Main Document** **Proof of Service** |
| May 02 2018 | Application (17A1205) granted by Justice Alito extending the time to file until June 22, 2018. |
| Jun 22 2018 | Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 26, 2018)<br><br>**Motion for Leave to Proceed in Forma Pauperis** **Petition** **Appendix** **Proof of Service** |
| Jul 17 2018 | Motion to extend the time to file a response from July 26, 2018 to August 27, 2018, submitted to The Clerk.<br><br>**Main Document** **Proof of Service** |
| Jul 20 2018 | Motion to extend the time to file a response is granted and the time is extended to and including August 27, 2018. |
| Jul 26 2018 | Brief amici curiae of Magnolia Bar Association, Mississippi Center for Justice, and Innocence Project New Orleans filed.<br><br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Aug 20 2018 | Motion to extend the time to file a response from August 27, 2018 to September 26, 2018, submitted to The Clerk.<br><br>**Main Document** **Proof of Service** |
| Aug 23 2018 | Motion to extend the time to file a response is granted and the time is further extended to and including September 26, 2018. |

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| Sep 27 2018 | Brief of respondent Mississippi in opposition filed.<br>**Main Document** **Proof of Service** |
| Oct 09 2018 | Reply of petitioner Curtis Flowers filed. (Distributed)<br>**Main Document** **Proof of Service** |
| Oct 11 2018 | DISTRIBUTED for Conference of 10/26/2018. |
| Oct 29 2018 | DISTRIBUTED for Conference of 11/2/2018. |
| Nov 02 2018 | Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether the Mississippi Supreme Court erred in how it applied Batson v. Kentucky, 476 U. S. 79 (1986), in this case. |
| Nov 20 2018 | Motion for an extension of time to file the joint appendix and petitioner's brief on the merits filed.<br>**Main Document** |
| Nov 27 2018 | Motion to extend the time to file the joint appendix and petitioner's brief on the merits granted and the time is extended to and including December 27, 2018. |
| Dec 27 2018 | Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Dec 27 2018 | Joint appendix filed (2 Volumes). (Statement of costs filed)<br>**Main Document** **Main Document** |
| Dec 27 2018 | Brief of petitioner Curtis Flowers filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Jan 03 2019 | Brief amici curiae of Former Justice Department Officials filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |
| Jan 08 2019 | Motion of respondent for an extension of time filed.<br>**Main Document** |
| Jan 15 2019 | Motion to extend the time to file respondent's brief on the merits is granted to and including February 7, 2019. |
| Jan 25 2019 | SET FOR ARGUMENT on Wednesday, March 20, 2019 |
| Feb 07 2019 | Brief of respondent State of Mississippi filed.<br>**Main Document** **Certificate of Word Count** **Proof of Service** |

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| Feb 14 2019 | CIRCULATED |
| Feb 26 2019 | Record received from the Supreme Court of Mississippi is electronic and complete. |
| Mar 07 2019 | Reply of petitioner Curtis Flowers filed. (Distributed)<br>**Main Document** **Proof of Service** **Certificate of Word Count** |
| Mar 20 2019 | Argued. For petitioner: Sheri Lynn Johnson, Ithaca, N. Y. For respondent: Jason Davis, Special Assistant Attorney General, Jackson, Miss. |

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

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No. 17-

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CURTIS GIOVANNI FLOWERS,

*Petitioner*,

-vs.-

STATE OF MISSISSIPPI,

*Respondent*.

# PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT


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**CAPITAL CASE**

Petitioner Curtis Flowers has been tried six times for the same offense in Mississippi state court. Through the first four trials, prosecutor Doug Evans relentlessly removed as many qualified African American jurors as he could. He struck all ten African Americans who came up for consideration during the first two trials, and he used all twenty-six of his allotted strikes against African Americans at the third and fourth trials. (The fifth jury hung on guilt-or-innocence and strike information is not in the available record). Along the way, Evans was twice adjudicated to have violated *Batson v. Kentucky* – once by the trial judge during the second trial, and once by the Mississippi Supreme Court after the third trial.

At the sixth trial Evans accepted the first qualified African American, then struck the remaining five. When Flowers challenged those strikes on direct appeal, a divided Mississippi Supreme Court reviewed Evans' proffered explanations for the strikes deferentially and without taking into account his extensive record of discrimination in this case, and affirmed. Flowers then sought review here, asking: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" This Court responded by granting certiorari, vacating the Mississippi Supreme Court's judgment, and remanding "for further consideration in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016)." *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016).

On remand, a divided Mississippi Supreme Court again affirmed. Over three dissents, the state court majority emphasized deference to the trial court, and insisted both that the "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons," and that "the historical evidence of past discrimination ... does not alter our analysis ...." *Flowers v. Mississippi*, 240 So.3d 1082, 1124 (Miss. 2018). The state court majority then repeated, nearly word-for-word, its previous, history-blind evaluation of Evans' strikes.

Because a prosecutor's personal history of verified, adjudicated discrimination is highly probative of both his propensity to discriminate and his willingness to mask that discrimination with false explanations at *Batson*'s third step, the barely altered question presented is:

> Whether a prosecutor's history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iv

CITATION TO OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

I. Doug Evans' relentless removal of African Americans throughout the trial history of this case ..... 3

II. The first petition, GVR, and the judgment challenged in this petition ..... 6

REASONS THE WRIT SHOULD BE GRANTED ..... 9

I. A prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors ..... 9

A. This Court's relevant precedent ..... 10

B. The state court's perseverative error ..... 12

1. Total White-out in *Flowers VI(A)* ..... 12

2. Explicit Dismissal of Evans' History in *Flowers VI(B)* ..... 14

C. The majority's reasons for refusing to evaluate the evidence of pretext in light of Evans' history ..... 16

1. The deference due the trial court's purported consideration of Evans' history of discrimination and dishonesty ..... 16

2. The probative value of Evans' history of discrimination and

dishonesty as compared to that of the historical evidence of discrimination present in *Miller-El* ..... 18

3. The moral comparison between Evans' history of racial discrimination and placing the letter "B" before the names of African-American jurors ..... 19

II. The state court's dismissal of the prior proximate history of discrimination was outcome determinative ..... 20

A. The strength of the *prima facie* case ..... 22

B. Disparate questioning ..... 22

C. Comparisons of struck black jurors and seated white jurors ..... 25

III. This Court should grant certiorari to ensure that lower courts consider all facts bearing on the credibility of the State's asserted reasons for a strike ..... 29

CONCLUSION ..... 31

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... *passim*

*Flowers v. Mississippi*, 579 U.S. ___, (2016) ..... 6, 14

*Foster v. Chatman*, 578 U.S. ___ (2016) ..... 1, 6

*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) ..... 29

*Georgia v. McCollum*, 505 U.S. 42 (1992) ..... 29

*Hernandez v. New York*, 500 U.S. 352 (1991) ..... 11, 29

*Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163 (1996) ..... 14

*Miller-El v. Cockrell*, 537 U.S 322 (2003) ..... 24, 25

*Miller-El v. Dretke*, 545 U.S. 231 (2005) ..... 8, 10, 11, 26, 28, 29,

*Powers v. Ohio*, 499 U.S. 400 (1991) ..... 29

*Snyder v. Louisiana*, 552 U.S. 472 (2008) ..... 10, 12, 15, 16, 17, 29

*Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252 (1977) ..... 12

### STATE CASES

*Flowers v. State*, 773 So.2d 309 (Miss. 2000) ..... 3

*Flowers v. State*, 842 So.2d 531 (Miss. 2003) ..... 3

*Flowers v. State*, 947 So.2d 910 (Miss. 2007) ..... *passim*

*Flowers v. State*, 158 So.3d 1009 (Miss. 2014) ..... *passim*

*Flowers v. State*, 240 So.3d 1082 (Miss. 2017) ..... *passim*

## STATUTES

28 U.S.C. § 1257 ..... 2

Fed. R. Evid. 404(b)(2) ..... 11

Miss. R. Evid. 404(b)(2) ..... 11

## MISCELLANEOUS

Clerk's Papers ..... 3, 4

Dave Mann, *Curtis Flowers' Prosecution Witness Says Testimony Was "Make Believe"*, Clarion Ledger, June 10, 2018, https://www.clarionledger.com/story/news/2018/06/10/curtis flowers-case-prosecution-witness-says-he-lied/685575002/ ..... 2

Sup. Ct. R. 14.1(g) ..... 2

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

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No. 17-

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CURTIS GIOVANNI FLOWERS,

*Petitioner*,

-vs.-

STATE OF MISSISSIPPI,

*Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

Petitioner, Curtis Giovanni Flowers, prays that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court.

## CITATION TO OPINION BELOW

The decision of the Mississippi Supreme Court affirming Flowers' convictions and death sentence after this Court granted Flowers' petition for certiorari, vacated the decision of the Mississippi Supreme Court, and remanded the case for consideration in light of *Foster v. Chatman*, 578 U.S. ___ (2016), is published at 240 So.3d 1082 (2017) ("*Flowers VI(B)*"), and is attached in the Appendix to this petition.

## JURISDICTION

The decision of the Mississippi Supreme Court at issue here was announced on November

2, 2017, and Petitioner's timely petition for rehearing was denied on February 22, 2018. *See* Appendix. By order dated May 2, 2018, Justice Alito extended the time to file this petition to and including June 22, 2018.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner, Curtis Flowers, has been tried six times – five times capitally, including the one that produced the judgment challenged here – in connection with a notorious 1996 quadruple homicide at a furniture store in the small town of Winona, Mississippi. There has never been any physical or forensic evidence connecting Flowers to the crime; the motive and methods ascribed to Flowers by the prosecution are objectively improbable; the witnesses relied upon to make up the circumstantial case for guilt have by turns been contradictory, unbelievable, or non-probative.[1] Throughout the half-dozen trials, the prosecution's persistent exclusion of African Americans from

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[1] The specific deficiencies in the prosecution's case against Flowers are detailed at pp. 8-49 of his brief to the Mississippi Supreme Court but omitted from this petition because they do not directly contribute to the concise statement necessary to frame the Question Presented. *See* Sup. Ct. R. 14.1(g). Since Flowers' last petition for certiorari was filed, another prosecution witness has been discredited; after being convicted of a triple homicide, Odette Hallmon recanted his testimony against Flowers – which he says was bought by prosecution promises of lenience. Dave Mann, *Curtis Flowers' Prosecution Witness Says All Testimony Was "Make Believe,"* The Clarion Ledger, June 10, 2018, https://www.clarionledger.com/story/news/2018/06/10/curtis-flowers-case-prosecution-witness-says-he-lied/685575002/.

jury service has been an enduring point of contention.

## I. DOUG EVANS' RELENTLESS REMOVAL OF AFRICAN AMERICANS THROUGHOUT THE TRIAL HISTORY OF THIS CASE.

Between them, the first two trials saw the prosecution peremptorily remove all ten African Americans who survived qualification and came up for seats on the jury. In the first trial this tactic resulted in an all-white jury. *See* Clerk's Papers 1656. In the second trial the judge disallowed one of the prosecution's strikes after finding it had been racially motivated; the resulting jury was made up of eleven whites desired by the prosecutors plus the lone African American Evans had been judicially prevented from removing. *See* Clerk's Papers 1662.[2]

Rebuked but undeterred, Evans pressed ahead with a third trial, and once again did his best to ensure that the African-American defendant would be tried by an all-white jury. This time, however, that effort was even more conspicuous as the prosecutor used all fifteen of his peremptory strikes against African Americans. The resulting jury contained one African American, who was seated only after the State's strikes were exhausted. While this tactic produced the desired result at trial – another conviction and death sentence – the victory was again short-lived. On direct appeal the Mississippi Supreme Court declared that the jury selection record presented "as strong a *prima facie* case of racial discrimination as [it] ha[d] ever seen in the context of a *Batson* challenge," *Flowers v. State*, 947 So.2d 910, 935 (Miss. 2007) ("*Flowers III*"), and went on to hold that the record "evince[d] an effort by the State to exclude African Americans from jury service,"

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[2] The convictions and death sentences obtained in the first and second trials were reversed for prosecutorial misconduct unrelated to jury selection. In the first, the prosecution was found to have acted "in bad faith" during improper cross-examination of a defense witness, *Flowers I*, 773 So.2d at 328-30, and in the second trial, the prosecution was caught having "repeatedly argued facts not in evidence" while attempting to repair damaging holes in its proof. *Flowers II*, 842 So.2d at 555-56.

*id.* at 937.

In contrast to the earlier proceedings, and for reasons not disclosed on the record, at the fourth trial the prosecutors elected to try the case non-capitally. Among other things, this eliminated the step of "death-qualifying" prospective jurors, and with it, the opportunity to remove a disproportionate number of African Americans for "cause." While the prosecutors sought to compensate by using all eleven of the peremptory strikes they exercised against African Americans, the resulting jury – seven whites and five African Americans – was far more reflective of the community than prior juries had been. *See* Clerk's Papers 1667-68. After hearing the evidence, the jurors were unable to reach consensus on the question of Flowers' guilt and a mistrial was declared. The available record concerning the fifth trial is sparse, but it also ended in a mistrial when the jury was unable to reach a unanimous verdict at the guilt-or-innocence phase. *See* Clerk's Papers 1891.

All told, through the four trials for which the record contains data, Evans:

- Used thirty-six (36) peremptory strikes against African Americans;
- Struck *every* qualified African American at each of the first three trials, all of which were capital, except for one left on the venire of the third trial when the prosecution had no remaining strikes; and
- Directed every one of the eleven (11) strikes exercised at the fourth trial against African Americans.

The sixth trial, like all but the fourth, proceeded as a capital case and largely marked a return to prosecution tactics that had been successful (albeit not in a lasting way) in earlier trials. While the prosecutors did adjust their jury selection tactics to lessen their vulnerability to a *Batson* objection – *e.g.*, by aggressively questioning African Americans to generate challenges for cause

and facially plausible bases for peremptory challenges – they still exercised strikes against five of the six African Americans tendered for consideration, and managed to seat a jury containing eleven whites out of an original venire that was 42% African American. The revival of the prosecution's strategy from the first three trials brought a familiar result: Flowers was once again convicted and sentenced to death.

Flowers appealed, contending, *inter alia*, that the prosecution had once again violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising its peremptory strikes on the basis of race. A divided Mississippi Supreme Court affirmed. The court split 6-3 over Flowers' *Batson* challenge. Although the prosecutor, Doug Evans, had long since distinguished himself – in this very case – as an especially willful and recalcitrant *Batson* violator, the Mississippi Supreme Court majority failed even to acknowledge, let alone consider, that well-documented history. *Flowers v. State*. 158 So.3d 1009 (Miss. 2014) ("*Flowers VI(A)*").[3] Instead, the majority confined itself to a narrow, mechanistic evaluation of the disparities in the prosecutor's approach to black and white veniremen, afforded him the benefit of the doubt where the evidence was open to interpretation, and credited his claims of race neutrality without hesitation.[4] Three justices dissented, criticizing the majority for ignoring the compelling facts of the prosecutor's history of race discrimination in

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[3] "*Flowers VI(A)*" refers to the first Mississippi Supreme Court opinion reviewing his conviction and death sentence at the sixth trial; "*Flowers VI(B)*" refers to its opinion reviewing the same conviction and death sentence after this Court's GVR in light of *Foster*.

[4] The majority's accommodating approach toward the prosecution was not limited to its treatment of the *Batson* issue. As the dissent noted, the majority also turned a blind eye toward the prosecution's repetition of some of the same closing argument misconduct that had led to reversal in *Flowers II*. *See Flowers VI(A)*, 158 So.3d at 1084 (King, J., dissenting) ("The Majority in today's case, by endorsing the prosecutor's misstatements — the same misstatements which warranted reversal in *Flowers II* — takes Mississippi one step closer to having misrepresentation of the facts presented at trial commonplace in our trial courts.")

the same case, *Flowers VI(A)*, 158 So.3d at 1089 (King, J., dissenting), and countering the majority's "robotic" acceptance of the prosecution's account with their own detailed comparative analysis – informed by history and other probative circumstances – demonstrating that the prosecutor had, for (at least) a third time, in fact, discriminated on the basis of race, *id.* at 1100.

## II. THE FIRST PETITION, GVR, AND THE JUDGMENT CHALLENGED IN THIS PETITION.

Flowers' petition for certiorari raised only one jury selection issue: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" While his petition was pending, this Court decided *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737 (2016), reversing a Georgia court that had rejected a claim of racial discrimination in the exercise of a prosecutor's peremptory challenge. This Court then granted Flowers' petition, vacated the state court's judgment, and remanded the case for consideration in light of *Foster*. *Flowers v. Mississippi*, 579 U.S. ___, 136 S.Ct. 2157 (2016) (Mem.).

Flowers filed a Supplemental Brief with the Mississippi Supreme Court, arguing that this Court's GVR required evaluation of the evidence of discrimination *in light of Evans' history of discrimination* – as his petition for certiorari had urged – and demonstrated that analysis for the state court. The State failed to join issue; after several digressions,[5] it purported to defend each

[5] First the State argued that GVRing the case was wrong, though without explaining how its position on the wisdom of an order by this Court could alter the state court's duty to follow that order. Next it asserted that there was no reason to think that the GVR was focused on the relevance of the prosecutor's history of discrimination, though without offering an alternative explanation of the purpose of the order. Then it argued that the prosecutor in this case had no history of discrimination in jury selection, despite the fact that Mississippi courts twice – in this same case – adjudicated him to have discriminated in the exercise of his peremptory challenges. The State even revived its argument that Flowers failed to establish a *prima facie* case, though neither the trial

of the challenged strikes, but without any reference at all to the prosecutor's history of discrimination.

The Mississippi Supreme Court again affirmed, again over three dissents. The bulk of the majority opinion is – virtually word for word, with an occasional citation added – the same history-blind analysis that comprised its prior opinion. Indeed, immediately preceding its repetition of that analysis the court underlined its adherence to that ahistorical approach: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124.

Three things distinguish the post-GVR majority opinion from the pre-GVR opinion. The post-GVR opinion does address *Foster*. However, at no point did the majority undertake to reconsider its decision in light of *Foster* in the way Flowers' brief (or the dissent) urged, or even to inquire why this Court might have GVRed the initial decision for reconsideration in light of *Foster*. Instead, its discussion of *Foster* is largely limited to recounting that case's factual details, a recitation prefaced by the disclaimer that "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118. Without explanation of either its moral or evidentiary calculus, it concludes: "The prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124.

The second difference between the two opinions is an assertion that deference is due to the

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court nor the state supreme court had bought that argument the first time around, and the State itself had declined to make it in its Brief in Opposition to the Petition for Certiorari.

trial judge's determination because "Flowers' counsel ensured that the trial court consider [sic] the totality of the circumstances, including historical evidence of racial discrimination by the district attorney," and that "the trial court certainly considered circumstances surrounding the previous trials." *Flowers VI(B)*, 240 So.3d at 1123. In support of this assertion, the court cites four ***arguments made by defense counsel*** that address the prior history of discrimination. It then quotes two of the trial court's responses to those arguments, neither of which reflects any "consideration" of that history. The first quoted response was not even made during the *Batson* hearing; it simply denies the request that the prosecution be prohibited from exercising any peremptory challenges, declaring that the *Batson* reversal in an earlier case was irrelevant. *Flowers VI(B)*, 240 So.3d at 1122–23. The other quoted response had nothing at all to do with prosecutor's prior discrimination, but was an assertion of the trial judge's perception that the two trials were similar in that many potential jurors knew the defendant. *Flowers VI(B)*, 240 So.3d at 1123–24.

The third difference between the two opinions is that the post-GVR version did – albeit briefly – address Flowers' contention that *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), compelled consideration of Evans' history. However, it did so only to reject the comparison, stating: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124 (citing *Miller-El II*, 545 U.S. at 266). The opinion offers no explanation for why the policy of an ***office*** – adopted when that policy had not yet been declared unconstitutional – would be more probative of willingness to lie and/or willingness to violate the Constitution than would be the prior adjudicated, unconstitutional discrimination of the ***individual*** whose credibility was at stake.

## REASONS THE WRIT SHOULD BE GRANTED

### I. A PROSECUTOR'S HISTORY OF ADJUDICATED PURPOSEFUL RACE DISCRIMINATION MUST BE CONSIDERED WHEN ASSESSING THE CREDIBILITY OF HIS PROFFERED EXPLANATIONS FOR PEREMPTORY STRIKES AGAINST MINORITY PROSPECTIVE JURORS.

The second time District Attorney Doug Evans tried Curtis Flowers, the trial court[6] found he had discriminated in the exercise of his peremptory challenges, and remedied that discrimination by seating an African American juror that Evans had struck on account of race.[7] This correction did not diminish Evans' determination to discriminate; in the next retrial of this case, *Flowers III*, the State exercised all fifteen of its peremptory strikes against African Americans. This time the discrimination was so blatant that the Mississippi Supreme Court not only reversed, but characterized the case as presenting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935.

In his sixth attempt to convict Flowers,[8] Evans made two small gestures toward covering his tracks: He accepted the first black juror before striking the remaining five, and he utilized wildly disparate questioning in an attempt to thwart the kind of comparative juror analysis that had

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[6] *Flowers II* and *Flowers VI* were presided over by different trial judges.

[7] Recall that the prosecution had also removed every African American from the jury in *Flowers I*.

[8] Recall further that Evans used all eleven of his peremptory strikes against African Americans at *Flowers IV* (and that there is no record of his strikes in *Flowers V*).

led to reversal in *Flowers III*. It was enough. In evaluating the evidence of purposeful racial discrimination in this retrial by the same prosecutor, the Mississippi Supreme Court refused to even *acknowledge* the very proximate history of discrimination. As the three dissenting justices objected, "To not consider this history is to rebuff *Batson*'s direction that 'all relevant circumstances' must be considered." *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

After a GVR from this Court, the Mississippi Supreme Court made its own small gesture: It acknowledged Evans' history, but only to dismiss it as irrelevant.

### A. THIS COURT'S RELEVANT PRECEDENT.

The Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in the exercise of the challenge. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Striking even a single juror based upon race, violates the Fourteenth Amendment. *Id.* at 95.

The party objecting to a peremptory strike "must first make a *prima facie* showing that race was the criteria for the exercise of the peremptory strike." *Batson*, 476 U.S. at 96-97. Upon such a showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, the trial court must determine whether the race neutral explanation is a pretext for racial discrimination. *Id.*

In order to determine whether to credit a prosecutor's facially neutral reasons, this Court has made plain that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*)). Among the factors this Court has found to "bear upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El II*, 545 U.S. at 240; "side-by-

side comparisons of some black venire panelists who were struck and white panelists allowed to serve," *id.* at 541; "contrasting *voir dire* questions posed respectively to black and nonblack panel members," *id.* at 255; and mischaracterization of the evidence, *id.* at 244.

Finally, and most pertinently here, this Court has also determined that a history of racial discrimination by the prosecuting office is probative. *Miller-El II*, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). As the three dissenters below pointed out, "[i]f the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of ***the same prosecutor in the retrial of the same case*** is a legitimate consideration." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

The object of this multi-factor inquiry is to evaluate the prosecutor's credibility, *i.e.*, to determine whether his proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). To that end, it is hard to imagine a better predictor of willingness to deceive than a documented history of dishonesty on the very matter at issue. Reams of impeachment law rest upon the firmly established proposition that propensity to be untruthful matters. Indeed, were this a criminal case, evidence of Evans' method of cloaking his discriminatory jury selection practices in bogus explanations would be admissible as ***substantive*** evidence of his "motive," "intent," "plan," or "absence of mistake." Fed. R. Evid. 404(b)(2); Miss. R. Evid. 404(b)(2). Thus, consideration of the history of the same prosecutor in prior trials of the same case is mandated both by *Miller-El*'s specific directive to consider a history of racial discrimination by the prosecuting office, and by *Batson*'s broader insistence that the trial judge must evaluate the

credibility of the prosecutor. *See also, Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

### B. THE STATE COURT'S PERSEVERATIVE ERROR.

In this case, Evans' propensity to discriminate and his willingness to falsely deny his discriminatory intent are beyond argument; he has been adjudicated to be both an egregious violator of *Batson*'s command, and a repeat offender.[9] Despite the indisputable, judicially-determined fact of prior discrimination and deception, and despite the clarity of this Court's instructions in *Batson, Miller-El,* and *Snyder*, the Mississippi Supreme Court has – twice – refused to consider that history in evaluating the race neutral reasons Evans proffered.

#### 1. Total White-out in *Flowers VI(A)*.

When first confronted with the proof that Evans discriminated in selecting the jurors who would serve in Flowers' sixth trial, the Mississippi Supreme Court steered its own course and completely ignored Evans' prior record. At no point in its evaluation of the evidence of discrimination did the majority assign any weight to Evans' history of racial discrimination, consider the way in which that history should influence interpretation of the other evidence of

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[9] As noted *supra*, in *Flowers III*, the State exercised all fifteen of its peremptory challenges against African Americans, twelve against potential jurors, and three against potential alternates, *Flowers III*, 947 So.2d at 916. The Mississippi Supreme Court found two clear *Batson* violations, and three more highly suspicious strikes where, in each case, the State offered multiple explanations, some of which were contradicted by the record, while others could not be rebutted. *Flowers III*, 947 So.2d at 936 ("While there was sufficient evidence to uphold the individual strikes of Golden, Reed, and Alexander Robinson under a 'clearly erroneous' or 'against the overwhelming weight of the evidence' standard, these strikes are also suspect, as an undertone of disparate treatment exists in the State's *voir dire* of these individuals.").

discrimination, or in any other way consider the probative value of that history. Indeed, at no point in its *Batson* discussion did the majority even *mention* the historical facts surrounding the claim of racial discrimination in the third trial, its own emphatic characterization of those facts as constituting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge," *Flowers III*, 947 So.2d at 935, or its own determination that Evans' racial discrimination in jury selection compelled reversal of the conviction.[10]

Even the state court's recitation of the factors for evaluating pretext was silent concerning prior history. According to the majority, five indicia of pretext should be considered when analyzing the race-neutral reasons for a peremptory strike: (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to *voir dire* as to the challenged characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits. *Flowers VI(B)*, 240 So.3d 1121 (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1047 (internal citations omitted). Although the state court's list overlaps with some of the criteria this Court recognized as probative in *Miller-El*, it omits both the strength of the *prima facie* case and the prior history of discrimination.

These omissions could not have been inadvertent. The Mississippi Supreme Court's own prior adjudication of discrimination should have made the history salient; if it did not, Flowers' briefing of the *Batson* issue identified "the very proximate history of discrimination" as the *first*

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[10] The majority opinion contains no reference to the outcome of *Flowers III* in its discussion of Flowers' *Batson* claim. It does note the holding of *Flowers III* in a separate section recounting the procedural history of the case, *Flowers VI(A)*, 947 So.2d at 1022, and in the course of discussing a venire selection claim - a discussion that occurs after the conclusion of the discussion of the Batson claim. *Id.* at 1059.

indicium of discrimination to be considered; and if that still were not enough, the three dissenters specifically protested that the majority's failure to take account of history in this case was contrary to *Batson*'s direction that "all relevant circumstances" must be considered, *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted). The majority, however, neither disputed the charge that it had disregarded probative history, nor attempted to defend its deviation from this Court's precedents. It was as if Evans' history, and the arguments concerning the probative value of that history, did not exist.

**2. Explicit Dismissal of Evans' History in *Flowers VI(B)*.**

Flowers' petition for certiorari raised only one jury selection issue: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" This Court called for the record, then granted certiorari, vacated the state court's judgment, and remanded the case for consideration in light of *Foster*. *Flowers v. Mississippi*, 579 U.S. ___, 136 S. Ct. 2157 (2016) (Mem.).

A GVR is appropriate "[w]here intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A lower court is not compelled to reverse a GVRed decision, but it *is* required to reconsider that decision. One member of the *Flowers VI(A)* majority, Chief Justice

Waller, faithfully did so, and in *Flowers VI(B)* joined Justice King's dissent.[11] The rest of the majority, however, instead rationalized why they need *not* do so.

Given the holding in *Foster* and the question posed in Flowers' petition, there is only one plausible interpretation of the GVR.[12] As in *Foster*, only the third step of *Batson* – determination of whether facially neutral reasons are pretextual – was at issue. "That step turns on factual determinations, *and in the absence of exceptional circumstances*," as this Court stated in *Foster*, "[a reviewing court should] defer to state court factual findings unless [it] conclude[s] that they are clearly erroneous." *Foster*, 136 S. Ct. at 1747 (citing *Snyder*, 552 U.S. at 477) (emphasis added). Thus, upon remand the state court was obliged to focus on the "exceptional circumstances" that prompted this Court to GVR the case, and reconsider the question of pretext in light of those circumstances to avoid a "clearly erroneous" result. Nonetheless, nowhere in the majority opinion is there an evaluation of the likelihood that Evans would do what he had done – at least twice – before, nor is there any consideration of the other evidence of discrimination in light of what Evans had shown himself willing to do. Rather, after citing three reasons for not conducting such an analysis, the majority – nearly word for word – simply pasted in its prior opinion. Before doing so, it proclaimed its adherence to an ahistorical approach: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124.

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[11] Despite the chief justice's reconsideration and shift to the dissent, there were three dissenting votes on the *Batson* issue in *Flowers VI(B)*, just as in *Flowers VI(A)*, because Justice Dickinson, who joined Justice King's dissent in *Flowers VI(A)*, had stepped down.

[12] Although the State's brief disputed this interpretation, it offered no alternative.

## C. THE MAJORITY'S REASONS FOR REFUSING TO EVALUATE THE EVIDENCE OF PRETEXT IN LIGHT OF EVANS' HISTORY.

Of the majority's three reasons for refusing to consider the probative value of Evans' adjudicated prior history discrimination and his past willingness to provide false explanations of his strikes to courts, one is unsupported by the record, and all three reflect a crabbed view of *Batson* that cannot be squared with this Court's precedents.

### 1. The deference due the trial court's purported consideration of Evans' history of discrimination and dishonesty.

A majority of the Mississippi Supreme Court articulated its role in reviewing *Batson* claims in a particularly self-limiting way: It gives "great deference to the trial court's determinations under *Batson* and will reverse only if the trial court's decision is clearly erroneous *or against the overwhelming weight of the evidence.*" *Flowers VI(B)*, 240 So.3d at 1121 (emphasis added). But what is important is not the "overwhelming weight of the evidence" gloss on this Court's language, but whether its application can be squared with this Court's precedents. First, it is important to note that any state court gloss must allow for the possibility that in some cases, the trial court's decision *will* be clearly erroneous; after all, *Miller-El* and *Snyder* are such cases. But more importantly, as this Court set forth in *Foster*, the clearly erroneous standard applies only "in the absence of exceptional circumstances." *Foster*, 136 S. Ct. at 1747. Evans' history of discrimination *is* extraordinary: Most prosecutors manage to avoid being adjudicated as a *Batson* violator even once; prosecutors with *two* such adjudications are rare; and a prosecutor with two such adjudications in prior trials of the *same defendant* is virtually unparalleled.

The state court majority also quotes *Snyder*'s observation that "the best evidence of

discriminatory intent often will be the demeanor of the attorney who exercises the challenge[.]" *Flowers VI(B)*, 240 So.3d at 1121 (quoting *Snyder*, 552 U.S. at 477). But "often" is not always, and an obvious exception is when the subject of the inquiry has previously shown himself willing and able to maintain an earnest demeanor while making statements later determined to be false. That very sequence unfolded in *Flowers III*, as the trial court had been taken in by Evans' explanations – presumably delivered with a reassuring demeanor – for using all fifteen of his strikes against African Americans, but the Mississippi Supreme Court later held in no uncertain terms that at least some of those explanations were pretextual, *i.e.*, false.

The trial judge in *Flowers VI* was not the same judge who was fooled by Evans' demeanor in *Flowers III*, and certainly he *could* have taken Evans' prior history of discrimination, dishonesty, and ability to deceive into account. Indeed, the state court majority asserts that he *did* take it into account, but there is absolutely no evidence in the record supporting that assertion. The majority quotes at length trial counsel's four arguments that Evans' history mattered, but it offers no language at all suggesting that the trial court either shared counsel's view or acted on it. Only two trial court responses to those arguments are quoted, neither of which reflects any "consideration" of that history. The first quoted response was not made during the *Batson* hearing, and denies the request that the prosecution be prohibited from exercising any peremptory challenges, declaring that the prior *Batson* reversal was irrelevant. *See* Tr. 1739 ("But because Flowers III was reversed on Batson is certainly no grounds for saying that they should now be denied the right to use peremptory."). The second quoted response contains literally nothing about prior discrimination, but simply asserts the trial judge's perception that in both trials many potential jurors knew the defendant. *See* Tr. 1738–39 ("But you know full well from past

experiences in this county because of the number of people that know Mr. Flowers . . . there is nothing that has - - that has - - no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family."). That the trial judge's response did not acknowledge or adopt the historical concern articulated by defense counsel should come as no surprise, for while the state court majority touts it as a reaction to counsel's argument, the trial court's statement was actually made *before* the argument was. *Compare Flowers IV(B)*, 240 So.3d at 1123 (quoting defense counsel at Tr. 1764–65; Tr. 1766–67; Tr. 1788–89) *with Flowers IV(B)*, 240 So.3d at 1123–24 (quoting the trial judge at Tr. 1738–39). Combing the *Batson* hearing transcript produces no language from the trial court that can plausibly be read either as weighing the history of discrimination, or as considering other evidence of discrimination in light of that history.

### 2. The probative value of Evans' history of discrimination and dishonesty as compared to that of the historical evidence of discrimination present in *Miller-El*

*Flowers VI(A)* did not even mention historical evidence of discrimination as a possible indicium of discrimination. *Flowers VI(B)* does acknowledge that *Miller-El* attaches probative value to prior history, but then dismisses that precedent with a remarkable comparison: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124.

True, the prior policy of an office is not the *same* thing as the adjudicated discrimination of the prosecutor himself. But on every plausible point of comparison, Evans' prior history is *more* probative of discriminatory intent than was the historical evidence in *Miller-El*. A *policy* is less probative than a confirmed *action*, particularly an action *taken more than once*. A practice

taken against *the same defendant in a trial of the same case* is more probative than a practice in *an unrelated case*. A policy adopted by an *office* is less probative than an action taken by very same *person* whose credibility is being evaluated. An action taken *after a practice is declared illegal* is more probative of willingness to break the law than is an action taken before such a declaration. Both Flowers' brief and the dissent point out the reasons to assign more weight to the historical evidence in this case than that presented in *Miller-El*, yet the majority opinion offers no explanation for how its dismissal of the probative value of the evidence here is consistent with *Miller-El*'s treatment of the same species of evidence.

### 3. The moral comparison between Evans' history of racial discrimination and placing the letter "B" before the names of African-American jurors.

At least as strange as the dismissive comparison to *Miller-El* is the majority's marginalization of *Foster*. Rather than attempting to discern guidance from *Foster* in accordance with this Court's mandate, the majority makes an obvious but unhelpful distinction: "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118. Then without elaboration it concludes: "The prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124. This statement is remarkable in two ways. First, there is no explanation of why the prior adjudicated *Batson* violations "do not undermine Evans' race neutral reason." How can that be? Surely the fact that a person gave race neutral reasons in a very, very similar situation in the past, *and those reasons were not true*, "undermines" the likelihood that new race neutral explanations, given in response to similar arguments from the same opponent, are true.

And second, why is it that the jury selection file in *Foster* was more "despicable" than was Evans' actual, purposeful discrimination in the exercise of his peremptory challenges in two prior trials? What is "despicable" – and, more importantly, unconstitutional – is racially biased decision-making. The "B" notations in *Foster* were a telltale sign that constitutionally forbidden racial bias was afoot; the prior adjudications of *Batson* violations in this case are firm proof that action in service of such bias was taken by Evans. To suggest that the former matters in a *Batson* step-three analysis but the latter does not – as the state court majority did here – is to misunderstand the object and operation of that analysis completely.

Taken together, the majority's attempts to distinguish this case from *Miller-El* and trivialize *Foster* suggest a fundamental error: It reads this Court as more concerned with prohibiting embarrassingly obvious *markers* of racial discrimination than it is with eradicating the discrimination itself. But the Equal Protection Clause of the Fourteenth Amendment does not command *discrete* racial discrimination, it forbids racial discrimination, and taken together, *Batson*, *Miller-El*, and *Foster* insist that courts must be willing to examine the entire record to determine whether such discrimination is present.

## II. THE STATE COURT'S DISMISSAL OF THE PRIOR PROXIMATE HISTORY OF DISCRIMINATION WAS OUTCOME DETERMINATIVE.

The State's brief to the Mississippi Supreme Court following the GVR conspicuously omits any effort to explain why, even evaluated in light of Evans' history in this case, the cumulative evidence of discriminatory intent did not establish pretext. The reason for that omission is simple: As dissenting Justice King's opinions – each joined by two other justices – painstakingly demonstrate, when the other evidence of discrimination is evaluated in light of Evans' history, the proffered reasons for his strikes are obviously pretextual.

As the dissenters carefully noted, "On its own, [Evans' prior history of discrimination] is not dispositive of a finding of racial discrimination." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d 1009, 1088 (2014) (King, J., dissenting) (internal citations omitted). Evans could have – and *should* have – learned the constitutional mandate of racial neutrality from the Mississippi's Supreme Court's rebuke in *Flowers III*, even though he clearly had not learned it from the trial court's finding of discrimination in *Flowers II*. Another prosecutor might have. But Evans did not.

The opinion in *Flowers III* - like the trial court's reinstatement of an African-American juror in *Flowers II* - neither rehabilitated nor deterred Evans. Instead, the Mississippi Supreme Court's opinion taught him the only lesson he was willing to learn: how to avoid the most obvious markers of racial motivation. In Flowers' sixth trial, Evans accepted the first African American juror who survived for-cause challenges – then struck the remaining five. This time he asked enough questions and gave enough reasons for each juror he struck to avoid making it *blatantly* obvious which of his reasons were pretextual. Close examination, however, shows greater cunning, but the same purposeful discrimination on the basis of race. Evans' questioning of African-American jurors was grossly disparate; his responses to similar *voir dire* answers varied with the juror's race; at several points he mischaracterized the responses of African-American jurors; and he even resorted to out-of-court investigation of an African-American juror in a desperate effort to generate a reason to strike her. *See Flowers VI(B)*, 240 So.3d at 1166–67 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1095 (King, J., dissenting). When this other evidence of pretext is considered *alongside Evans' history of discrimination* – as mandated by *Miller-El*, as faithfully undertaken by the dissenters, and as directed by the GVR in light of *Foster* – the

Mississippi Supreme Court's interpretation of these other indicia of discrimination becomes untenable.

### A. THE STRENGTH OF THE *PRIMA FACIE* CASE.

Both the *Flowers VI(A)* majority opinion and the *Flowers VI(B)* majority opinion fail to consider the strength of the *prima facie* case at all.[13] In contrast, after noting the necessity of considering the history of discrimination, the three dissenting justices made detailed observations about the significance of the strength of the *prima facie* case, concluding that both the numbers and the suspicious timing of the strikes "reveal a clear pattern" of disparate treatment.[14]

### B. DISPARATE QUESTIONING.

The disagreement between the majority and dissent over whether Evans' history of

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[13] In *Flowers III*, the Mississippi Supreme Court *had* commented on the strength of the prima facie case, and offered no reason for its failure to consider that factor in *Flowers VI*.

[14] *Flowers VI(B)*, 240 So.3d at 1060–61 (King, J., dissenting) (transcript citations omitted); ("Like the history of today's case, a review of the statistics relating to the prosecutor's use of peremptory strikes is not, standing alone, dispositive of the *Batson* inquiry. These numbers, however, reveal a clear pattern of disparate treatment between white and African–American venire members. . . The original venire consisted of forty-two percent African Americans. After the jury qualification and initial for-cause challenges, the venire consisted of twenty-eight percent African Americans. Ultimately, one African American served as a juror and one African American served as an alternate juror. Despite the initial venire consisting of forty-two percent African Americans, the jury that convicted and sentenced Flowers consisted of eight percent African Americans. ... Evans accepted the first African American juror . . . but even this decision was suggestive of racial bias, the State's treatment of Robinson suggests it was attempting to insulate subsequent challenges by accepting a token black juror. The *voir dire* was brief. Moreover, although Robinson raised his hand during group *voir dire* to indicate he knew [a relative of Flowers] he was not further questioned by the State on this relationship. In contrast, when Evans offered race-neutral reasons for striking African-American juror Dianne Copper, he pointed to the fact Copper indicated she knew [Petitioner's relative]. This is suspicious, even though standing alone, it proves little. The State then struck all of the remaining five African American potential jurors. ... (Indeed, looked at another way, the State struck all of the African American *women* potentially available for selection as jurors.)."); *Flowers VI(A)*, 158 So.3d at 1090 (King, J., dissenting) (transcript citations omitted) (same).

discrimination was relevant also affected the scrutiny each afforded the evidence of disparate questioning. The majority seemed most focused upon disparaging the probative value of disparate questioning evidence, insisting not once but three times that disparate questioning "alone" cannot establish racial motivation. *Flowers VI(B)*, 240 So.3d at 1125; 1126; 1135; *Flowers VI(A)*, 158 So,3d at 1048; 1049; 1057. This statement is likely an erroneous characterization of the law; a case with no questioning of any white jurors and extensive questioning of all black jurors might without more establish purposeful discrimination. But more importantly, the premise was obviously erroneous: Evans' disparate questioning did not stand "alone," but at the very least, was accompanied by a strong *prima facie* case and a distinctive history of prior discrimination.

Moreover, the majority's view of the evidence of disparate questioning was unduly deferential toward the state's contentions:

> The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record. Most of the followup questions pertained to the potential juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial. The jurors who had heard little about the case, who said they would not be influenced by what they had heard, and who said they would not be influenced by relationships were asked the fewest questions. The jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty were asked more questions.

*Flowers VI(B)*, 240 So.3d at 1125; *Flowers VI(A)*, 158 So.3d at 1048. Although these generalizations are largely true – *more* African-American jurors knew the parties, *most* of the follow-up questions pertained to relevant matters, *more* questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty – this trusting reliance on

reassuring generalizations was not appropriate given Evans' history. On the contrary, in light of that history, it was incumbent upon a reviewing court to probe whether those generalizations provided a *full* explanation for the disparities.

When the dissent approached the matter of disparate questioning, it did so with appropriately greater skepticism, and came to a different conclusion:

> An analysis of the number and type of questions asked by the prosecutor further reveals a pattern of disparate treatment. During individual *voir dire*, the prosecutor asked white jurors an average of approximately three questions. African-American jurors, however, were asked approximately ten questions each by the prosecutor.
>
> Further, in what appears to be mere lip service to the *voir dire* process, when questioning most white jurors during individual *voir dire*, the prosecutor essentially repeated questions that the trial court had just asked. The trial court asked each juror standard death-penalty-qualification questions. The prosecutor would then—in substance—ask the same questions and then hand the juror off to be questioned by the defense. The prosecutor asked only nine percent of white jurors something beyond these duplicated questions.
>
> In a stark contrast, the prosecution asked sixty-three percent of African-Americans questions outside of the standard death-penalty-qualification questions. As an example, fifty-five percent of African-American jurors who had some kind of connection to the Flowers family (through work, the community, or family) were asked questions by the prosecutor about this connection. Although five white jurors had similar connections to the Flowers family (through work and the community), the prosecutor failed to ask any questions about these connections.
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> As noted in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), statistical analysis can raise a question as to whether race influenced the jury selection process. The numbers described above are too disparate to be explained away or categorized as mere happenstance.

*Flowers VI(B)*, 240 So.3d at 1061 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1089 (King, J., dissenting).

In addition, when an apparently acceptable African-American juror was in the box, the

State asked highly leading questions, plainly trolling for an excuse for a strike.[15] Careful parsing of questioning is important, for absent vigilance – vigilance which was particularly appropriate given Evans' prior history of discrimination – disparate questioning can obstruct comparative juror analysis. Had the majority been vigilant, it would have been primed to conclude that, because "the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Miller-El v. Cockrell*, 537 U.S 322, 344 (2003) (*Miller-El I*). Instead, given its disregard of Evans' history, it accepted the State's explanation for disparate questioning at face value.

### C. COMPARISONS OF STRUCK BLACK JURORS AND SEATED WHITE JURORS.

A comparison of the majority's and dissent's approaches to individual struck African-American jurors reveals the further impact of their divided views on the significance of history. The majority and dissent agree that the strike of one of the African-American jurors was supported

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[15] For example, when African-American prospective juror Diane Copper stated she previously worked at Shoe World at the same time Cora Flowers was employed there, Tr. 770–71, Evans attempted to lead her into saying that the relationship was a close one:

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|---|---|
| EVANS: | How long did you work with Cora? |
| COPPER: | I can't remember the exact – probably about a year or something like that. |
| EVANS: | Okay. Were y'all pretty close? |
| COPPER: | It was more like a working relationship, you know. |
| EVANS: | Did you ever visit with each other? |
| COPPER: | No, sir. |

Tr. 973. Later, Evans again tried to lead Copper into admitting that her relationships with defense witnesses "would be something that would be entering into your mind if you were on the jury, wouldn't it?" Tr. 1407. In contrast, the State accepted without any inquiry similar assurances of relationships being purely "working" when white jurors Pamela Chesteen and Bobby Lester volunteered them during the trial court's *voir dire*. Tr. 986; 799.

by race neutral reasons, but their analyses of each of the other four African-American jurors diverge. For each of those four jurors, the majority recited the reasons Evans gave for each strike, and finding some record support for at least one of the reasons he proffered, concluded that the strike was not pretextual. In contrast, the dissent did not stop with the facially plausible reason, but went on to consider proffered evidence of prevarication.

A full appreciation of the difference between the approaches of the majority and dissent requires a side by side reading of their respective opinions. However, their views on the strike of Carolyn Wright are illustrative. The majority's conclusion is unequivocal: "Flowers's claim that the State provided 'no convincing reasons' for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture."[16] *Flowers VI(B)*, 240 So.3d at 1127; *Flowers VI(A)*, 158 So.3d at 1049. Problems with each of these reasons, however, were pointed out by the dissent. Regarding the "working relationship" with Flowers' father, the dissent noted:

> Although the State cited Wright's working relationship with Archie Flowers as a basis for its strike, the State made no effort during *voir dire* to question Wright about the working relationship beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group *voir dire* that she was unaware of whether Archie Flowers still worked at Wal-Mart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect.

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[16] The majority also "note[d]" that "on her juror questionnaire, Wright wrote that she had previously served as a juror in a criminal case involving the "Tardy Furniture trial." Evans, however, did not state this as a reason for striking Wright, and it therefore cannot support the strike. *See Miller-El II*, 545 U.S. at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

240 So.3d at 1163 (King, J., dissenting); 158 So.3d at 1092 (King, J., dissenting).

Regarding the second cited reason, Wright's acquaintance with potential witnesses, the dissent cited to dispositive facts about comparable white jurors: accepted white juror Chesteen "knew thirty-one people involved in Flowers's case;" accepted white juror Waller "knew eighteen people involved in the case;" and accepted white juror Lester "knew twenty-seven people involved in the case." *Flowers VI(B)*, 240 So.3d at 1162 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1091 (King, J., dissenting).[17]

Finally, with respect to the prosecution's stated reason that Wright had both been sued and had her wages garnished by Tardy's furniture store, the dissent found that reason also suspicious, both because Wright had stated that the litigation was "paid off" and would not affect her as a juror, and because *"[t]here is nothing in the record supporting the contention that Wright's wages were garnished."*[18] *Flowers VI(B)*, 240 So.3d at 1162; *Flowers VI(A)*, 158 So.3d at 1091.

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[17] At an earlier point, the majority had acknowledged the existence of accepted white jurors who also knew many of the witnesses, but rationalized that "the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext." *Flowers VI(B)*, 240 So.3d at 1126; *Flowers VI(A)*, 158 So.3d at 1049. However, this statement hardly explains why the majority would later in the opinion list the number of acquaintances as a "convincing reason" for her strike. Nor does it explain why the court did not count the comparison as evidence of pretext, even if not dispositive of the question.

[18] The majority acknowledged that the record did not support the contention that Wright's wages had been garnished, but dismissed it as irrelevant because "that does not change the fact that being sued by Tardy Furniture was a race-neutral reason for striking Wright." *Flowers VI(B)*, 240 So.3d at 1127; *Flowers VI(A)*, 158 So.3d at 1050. In the dissent's view, however, the mischaracterization was significant:

> The State did mischaracterize its basis for the peremptory strike. Further, unlike [another factual misstatement by Evans regarding juror Wright, one that alleged her acquaintance with one of Petitioner's relatives], the statement that Wright had her wages

The two opinions' treatment of the other three struck jurors is similarly discordant. The majority is correct that for each struck juror Evans cited at least one reason with record support that did not precisely apply to a white juror he had accepted. But given the backdrop of Mississippi Supreme Court's opinion in *Flowers III* and the rest of Evans' history in this case, only the most unsophisticated prosecutor would not have had such a reason at hand. And given that backdrop, the dissent was correct that a facile inquiry was insufficient:

> Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

*Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting); (quoting *Miller-El II*, 545 U.S. at 239-40 (citing *Batson*, 476 U.S. at 96-97)); *Flowers VI*, 158 So.3d at 1088 (King, J., dissenting) (quoting *Miller-El II*, 545 U.S. at 239-40 (citing *Batson*, 476 U.S. at 96-97)). "If anything more is needed for an undeniable explanation of what was going on, history supplies it." *Miller-El II*, 545 U.S. at 266.

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> garnished seems to go directly to reasoning for the State's strike—that Wright would have some sort of ill will toward Tardy's as a result of her wages being garnished. It is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages. As such, the State's unsupported characterization of the lawsuit is problematic.

*Flowers VI(B)*, 240 So.3d at 1163 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1091 (King, J., dissenting).

## III. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE THAT LOWER COURTS CONSIDER ALL FACTS BEARING ON THE CREDIBILITY OF THE STATE'S ASSERTED REASONS FOR A STRIKE.

"[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238 (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991), and citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson*, 476 U.S. at 87)). Here, the specter of cynicism has two faces. Not only did Evans' discrimination in jury selection threaten public confidence in jury neutrality, his avoidance of the rule of law by thinly veiled pretext threatens public confidence in the effectiveness of the courts at enforcing the law.

While disputes over the weight that should be accorded to various indicia of racial motivation are not uncommon, Flowers is aware of no other case in which a lower court has refused to *consider* any of the factors that this Court has deemed relevant. Moreover, the particular factor the state court dismissed as "not undermin[ing] Evans' race neutral reasons" is not only one of those recognized by this Court in *Miller-El*, but one that is inextricably connected with the question of pretext. Certainly, as *Miller-El* recognized, the prior history of the prosecuting office is relevant for its value in establishing *propensity to discriminate*. But the prior history of the prosecutor himself is also relevant in another way: his propensity to give false explanations (or, at the very least, his vulnerability to gross self-delusion), which, in turn, is closely related to the central issue of the credibility of his purported reasons for his strikes. *Snyder*, 552 U.S. at 477 (citing *Batson*, 476 U.S. at 98, n. 21) (observing that step three of the inquiry required evaluating the prosecutor's credibility); *Hernandez*, 500 U.S. at 365 (question at *Batson*'s third step is whether

prosecutor's proffered reasons "should be believed"). For a court to *dismiss* the unreliability of a prosecutor's prior statements on a *very closely related matter* is such a gross deviation from ordinary fact-finding that it displays a lack of appreciation for the importance of the inquiry. Such laxness in enforcement of the Equal Protection Clause of the Fourteenth Amendment must be corrected.

Finally, permitting a court to ignore a prosecutor's history of deliberate violation of the command against racial discrimination has a particularly pernicious effect on deterrence. A prosecutor with such a history – particularly a prosecutor with an adjudicated history of persisting in discrimination after the first finding of racially motivated exercise of his peremptory challenge – is exactly the person who can only be motivated by consequences, not by principle. The Mississippi Supreme Court's unintended message to such a person is: Just be careful to cover your tracks.

This Court should grant certiorari to make plain to the lower courts that they may not ignore any indicium of discrimination, and to make plain to prosecutors who are caught disobeying the command of the Equal Protection Clause – or who contemplate such disobedience – that flouting the Constitution will not be rewarded.

## CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant certiorari

Respectfully submitted,

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June 21, 2018

240 So.3d 1082
Supreme Court of Mississippi.

Curtis Giovanni FLOWERS a/k/a Curtis Flowers a/k/a Curtis G. Flowers
v.
STATE of Mississippi
NO. 2010–DP–01348–SCT

|
11/02/2017

**Synopsis**
**Background:** After defendant's capital murder convictions and death sentence were affirmed on appeal, 158 So.3d 1009, defendant petitioned for writ of certiorari. The United States Supreme Court, 136 S.Ct. 2157, granted petition, vacated state court opinion affirming convictions and sentence, and remanded.

**Holdings:** On remand, the Mississippi Supreme Court, en banc, Coleman, J., held that:

[1] out-of-court photographic lineup was not impermissibly suggestive;

[2] trial court acted within its discretion in finding that proffered testimony of defendant's law enforcement expert, stating that homicide investigation which led to defendant's arrest was flawed in several ways, was unreliable and thus inadmissible;

[3] trial court acted within its discretion in finding that probative value of evidence that a single particle of gunshot residue was found on defendant's hand approximately three hours after murders was not substantially outweighed by danger of unfair prejudice;

[4] State's capital murder case against defendant was not circumstantial, and thus State was not required to exclude every other reasonable hypothesis for evidence to be sufficient to support conviction;

[5] prosecutor's closing argument misstatement regarding time witness discovered victims was not plain error;

[6] fact that prosecutor committed *Batson* violation in prior trial of same capital murder case against defendant did not preclude finding on retrial that same prosecutor's race-neutral explanations for striking five African-American venire members were credible.

**Affirmed.**

Waller, C.J., filed dissenting opinion in which Kitchens, P.J., and Ishee, J., joined.

King, J., filed dissenting opinion in which Kitchens, P.J., joined and Waller, C.J., joined in part.

*1091 MONTGOMERY COUNTY CIRCUIT COURT, HON. JOSEPH H. LOPER, JR., J.

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EN BANC.

Opinion

COLEMAN, JUSTICE, FOR THE COURT:

¶ 1. Curtis Giovanni Flowers was indicted on four counts of capital murder with the underlying felony of armed robbery, stemming from the 1996 murders of four employees of Tardy Furniture Store in Winona, Mississippi. Following his sixth trial, he was convicted on all four counts of capital murder and sentenced to death. The Court affirmed his convictions and death sentence in *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI*). Flowers filed a petition for a writ of certiorari with the United States Supreme Court. In *Flowers v. Mississippi*, — U.S. —, 136 S.Ct. 2157, 195 L.Ed.2d 817 (2016), the Supreme Court granted Flowers's petition for a writ of certiorari, vacated the Court's judgment in *Flowers VI*, and remanded the case to the Court for further consideration in light of *1092 *Foster v. Chatman*, — U.S. —, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016).

¶ 2. The Supreme Court decided *Foster* after *Flowers VI* had been decided by the Court.[1] Because the sole issue raised in *Foster* was whether the prosecution's use of peremptory strikes was racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court's order pertains to only one issue raised by Flowers in his latest appeal to the Court—the *Batson* issue. Accordingly, the remaining issues addressed by the Court in *Flowers VI* were not disturbed and the Court's opinion as to the remaining issues is reinstated as fully set out herein.

¶ 3. On remand, the Court afforded the parties an opportunity to submit supplemental briefs in light of *Foster* as directed by the Supreme Court. After review and further consideration in light of *Foster*, we discern no *Batson* violation and reinstate and affirm Flowers's convictions and death sentence.

Factual Background and Procedural History

¶ 4. At approximately 9:00 on the morning of July 16, 1996, Bertha Tardy, the owner of Tardy Furniture Store, called Sam Jones and asked him to come to the store to train two new employees. When Jones arrived at the store a short time later, he discovered the bodies of Bertha Tardy, Robert Golden, Carmen Rigby, and Derrick Stewart. All four victims had been shot in the head; Stewart was the only victim still alive when Jones arrived. Jones went to a nearby business and asked an employee to call the police. Johnny Hargrove, the City of Winona Police Chief, was the first law enforcement officer to arrive; he called for backup and ambulance services. Shell casings from 0.380 caliber bullets were recovered from the scene, and a bloody shoeprint was found near one of the victims.

¶ 5. Shortly after officers arrived at the scene, law enforcement officers received a call about an auto burglary at Angelica

Garment Factory in Winona. Deputy Sheriff Bill Thornburg responded, and he learned that someone had burglarized Doyle Simpson's car and had stolen a 0.380 caliber pistol. Katherine Snow, an Angelica employee, placed Curtis Flowers at Simpson's car around 7:15 that morning.

¶ 6. Police interviewed Flowers around 1:30 that afternoon, and Flowers consented to a gunshot residue test. Police interviewed Flowers again two days later on July 18, 1996. Flowers claimed to have been babysitting his girlfriend's children on the morning of the murders, but he provided inconsistent statements about his schedule. During the July 16 interview, Flowers said that he woke up around 6:30 a.m. on the day of the murders and went to his sister's house around 9:00 a.m., then went to a local store around 10:00 a.m. On July 18, Flowers said that, on the morning of the murders, he woke up around 9:30 a.m., went to his sister's house around noon, and went to the store at approximately 12:45 p.m. Flowers told investigators that he had been employed at Tardy Furniture for a few days earlier that month, but he had been fired on July 6 after he did not show up for a few days. Flowers moved to Texas in September 1996. After further investigation, Flowers was arrested and brought back to Mississippi. He was indicted on four separate counts of capital murder in March 1997.

*1093 ¶ 7. Flowers was tried for the murder of Bertha Tardy in October 1997. After a change of venue from Montgomery County to Lee County, Flowers was convicted and sentenced to death. Flowers appealed and we reversed and remanded for a new trial on the ground that Flowers's right to a fair trial had been violated by admission of evidence of the other three murder victims. *Flowers v. State*, 773 So.2d 309 (Miss. 2000) ("*Flowers I*"). Flowers's second trial was for the murder of Derrick Stewart; it was held in Harrison County in March 1999. The jury returned a guilty verdict and sentenced Flowers to death. On appeal, we again reversed and remanded for a new trial. The Court held that Flowers's right to a fair trial had been violated, again, by admission of evidence of the other victims and by the prosecution arguing facts that were not in evidence. *Flowers v. State*, 842 So.2d 531 (Miss. 2003) ("*Flowers II*").

¶ 8. The Montgomery County Circuit Court held Flowers's third trial in 2004 and tried him for all four murders. The jury found Flowers guilty and sentenced him to death. Finding that the State had engaged in racial discrimination during jury selection, the Court once again reversed and remanded the case for a new trial. *Flowers v. State*, 947 So.2d 910 (Miss. 2007) ("*Flowers III*"). Flowers's fourth and fifth trials also were on all four counts of capital murder. Both resulted in mistrials when the jury was unable to reach a unanimous verdict during the culpability phase. The State did not seek the death penalty in the fourth trial but did seek it in the fifth trial.

¶ 9. The circuit court conducted Flowers's sixth trial, the subject of the instant appeal, in June 2010 in Montgomery County. The State tried Flowers for all four murders. The State called twenty-one witnesses in its case-in-chief. Police Chief Johnny Hargrove was the State's first witness. Hargrove testified that police had found a bloody shoeprint at the scene. Hargrove had asked the District Attorney's Office and the Highway Patrol to help investigate the murders. Mississippi Highway Patrol Investigator Jack Matthews testified that he saw a bloody shoeprint and shell casings scattered near the bodies. Matthews testified that cash was taken from the store during the murders and that he found Flowers's time sheet and a check made out to him for $82.58 on Bertha Tardy's desk. Matthews said that, according to the documents on Bertha Tardy's desk, the store would have had $300 cash on hand that morning. However, there was only change, no bills, in the cash drawer. During his investigation, Matthews spoke with Roxanne Ballard, Bertha Tardy's daughter, and learned that Flowers recently had been fired from his job at Tardy Furniture. Matthews testified that $235 was found hidden in Flowers's headboard after the murders. He also testified that Flowers wore a size ten-and-a-half shoe.

¶ 10. Ballard was the bookkeeper at Tardy Furniture and had worked in the store her whole life. Looking at the books from the morning of the murders, Ballard testified that the store had $400 in the cash drawer that morning. However, she confirmed Matthews's testimony that the books showed $300, but Ballard saw a receipt for a late charge in the amount of $100, so she knew the drawer had contained a total of $400. Ballard testified that $389 was missing from the cash drawer after the murders. Also, looking at pictures from the crime scene, Ballard testified that the photos showed a bank bag lying wide open on a pile of fabric swatches. She testified that the bank bag was always closed and it should have been in a drawer or on Carmen Rigby's desk.

*1094 ¶ 11. Melissa Schoene, a crime scene expert with the Mississippi Crime Laboratory, testified that she took impressions of the bloody shoeprint and collected the 0.380 caliber casings. Sheriff Bill Thornburg testified that he had gone to Angelica Garment Factory on the day of the murders to investigate Doyle Simpson's stolen 0.380 caliber pistol. Thornburg testified that it looked like a screwdriver or tire iron had been used to pry open the glove box of Simpson's car. Thornburg also went to Simpson's mother's home to collect spent 0.380 hulls from Simpson's gun. A few days after the murders, Thornburg searched the home of Connie Moore, Flowers's girlfriend. He found a size ten-and-a-half Fila Grant Hill shoebox in a dresser at Moore's house.

¶ 12. David Balash, a firearms identification expert, testified that the bullets collected from Tardy Furniture either matched the bullets or were consistent with the bullets collected from Simpson's mother's house. Joe Andrews, a forensic scientist specializing in trace evidence, testified that Flowers's gunshot residue test revealed one particle of gunshot residue on the back of Flowers's right hand. Andrews also analyzed the shoeprint found at Tardy Furniture, and he determined that the print was consistent with size ten-and-a-half Fila Grant Hill tennis shoes. Patricia Hallmon Odom Sullivan, one of Flowers's neighbors, testified that she saw Flowers wearing Fila Grant Hill tennis shoes at 7:30 a.m. on the day of the murders. Elaine Goldstein, another neighbor, testified that she had seen Flowers wear Fila Grant Hill tennis shoes a couple of months before the murders.

¶ 13. Multiple witnesses placed Flowers at or around Angelica Garment Factory and Tardy Furniture on the morning of the murders. Katherine Snow, an Angelica Garment Factory employee, testified that she saw Flowers leaning against Simpson's car at 7:15 on the morning of the murders. Snow also identified Flowers in a photographic lineup and in court. James Kennedy testified that he saw Flowers walking toward Angelica Garment Factory at 7:15 a.m. Edward McChristian testified that he saw Flowers walking north, away from Angelica Garment Factory, between 7:30 and 8:00 a.m. Mary Jeanette Fleming testified that she saw Flowers walking toward Tardy Furniture at approximately 9:00 a.m. Beneva Henry testified that she saw Flowers walking toward downtown Winona, in the direction of Tardy Furniture, sometime between 9:00 and 9:30 a.m.[2] Clemmie Fleming testified that she was going to Tardy Furniture to pay a bill a little after 10:00 a.m, and she saw Flowers running away from the back of Tardy Furniture.

¶ 14. Porky Collins testified that he saw two African–American men, who appeared to be arguing, outside Tardy Furniture at around 10:00 on the morning of the murders. Collins circled the block and returned to where he saw the men arguing; at that point, the men were headed toward Tardy Furniture. Collins identified Flowers as one of the men he saw that morning. Doyle Simpson testified that his 0.380 caliber pistol was in his car's glove compartment when he arrived at Angelica the morning of July 16, 1996. Simpson discovered that his gun was missing at approximately 11:00 a.m. that day. Simpson, who was Flowers's uncle, testified that Flowers *1095 knew he had a gun and that Flowers had seen it in his car before. Odell Hallmon, a jailhouse informant who had been in a cell next to Flowers, testified that Flowers had confessed to killing four people at Tardy Furniture.

¶ 15. After the State's case-in-chief, the defense moved for a directed verdict, which the trial court denied. The first witness to testify in the defense's case-in-chief was Mike McSparrin, a fingerprint expert. McSparrin testified that the fingerprints found at the crime scene, as well as on the Fila shoebox, did not match Flowers's fingerprints. The defense also called Steve Byrd, a firearms forensic analyst. Byrd testified that he could not definitively determine whether all of the bullets recovered from the crime scene were fired from the same gun. James Williams, a law enforcement investigator, testified that he did not see a bloody footprint when he first arrived at Tardy Furniture. Billy Glover testified that, on the day of the murders, he saw Flowers around 9:00 a.m. at a friend's house and that they talked for fifteen or twenty minutes. Connie Moore, Flowers's girlfriend at the time, testified that she had purchased a pair of size ten-and-a-half Fila Grant Hill tennis shoes for her son.

¶ 16. Stacey Wright testified that Clemmie Flemming had admitted to her that she had lied about seeing Flowers running away from Tardy Furniture on the morning of the murders. Wright testified that Clemmie had said she would get money or have her bill paid at Tardy Furniture in return for her statement against Flowers. Clemmie's sister, Mary Flemming, testified that she was

with Clemmie the morning of the murders and that Clemmie did not go to Tardy Furniture to pay her bill that morning. Latarsha Blissett also testified that Clemmie had told her that if she made a statement against Flowers, she would get money or have her account at Tardy Furniture paid. Further, Blissett testified that investigators had asked her if she knew Flowers's shoe size and had implied that she would receive reward money for providing a statement. Kittery Jones, Flowers's cousin, also testified that investigators had implied that he would receive reward money in return for providing a statement linking Flowers to the murders.

¶ 17. On June 18, 2010, the jury returned a guilty verdict for all four murders. Following the sentencing hearing, the jury sentenced Flowers to death. The jury found the following aggravating circumstances beyond a reasonable doubt: (1) the defendant knowingly created a great risk of death to many persons; (2) the capital offenses were committed while the defendant was engaged in the commission of an armed robbery for pecuniary gain; and (3) the capital offenses were committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Flowers filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, which was denied. Flowers timely filed a notice of appeal.

Issues

¶ 18. Flowers raises the following thirteen assignments of error on appeal:

1. The evidence presented at Flowers's trial was constitutionally insufficient to support a finding of guilt beyond a reasonable doubt, as mandated by the Fifth and Fourteenth Amendments to the United States Constitution and Section Fourteen of the Mississippi Constitution.

2. Flowers's right to a fair trial, as guaranteed by Mississippi law and the Fourteenth Amendment to the United States Constitution, was violated when the prosecution repeatedly *1096 argued material facts not in evidence during its culpability phase closing argument.

3. The in-court and out-of-court eyewitness identifications of Flowers by Porky Collins were constitutionally unreliable and the trial court erred in overruling Flowers's objections to their admission.

4. The trial court's exclusion of expert testimony explaining the deficiencies in law enforcement's investigation, and the defects in the composition of the photo lineups shown to Porky Collins, violated Mississippi law and Flowers's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in refusing to exclude prosecution testimony that a single particle of gunshot residue had been detected on Flowers's hand.

6. The jury selection process, the composition of the venire and the jury seated, and pervasive racial and other bias surrounding this matter violated Flowers's fundamental constitutional rights protected by the Sixth and Fourteenth Amendments.

a. The prosecutor violated the Equal Protection Clause of the Fourteenth Amendment when he struck five African American jurors after utilizing disparate questioning and citing pretextual reasons.

b. The jury failed to adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

c. Pervasive racial bias in the venire infected the fairness of the proceedings, and requires reversal and remand for a new trial.

7. The State's six attempts to convict Flowers of the same offense violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

8. The trial court reversibly erred in refusing Flowers's requested circumstantial evidence instructions at the culpability phase.

9. The trial court reversibly erred in the penalty phase instructions to the jury.

10. The convictions and death sentences in this matter were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the counterparts in the Mississippi Constitution.

11. This Court should set aside its prior order denying Flowers's Motion for Remand and Leave to File Supplemental Motion for New Trial.

12. The death sentence in this matter is constitutionally and statutorily disproportionate.

13. The cumulative effect of the errors mandates reversal of the verdict of guilt and/or the sentence of death entered pursuant to it.

We address each of Flowers's issues but have summarized and reorganized several issues for the purpose of discussion.

Discussion

[1]¶ 19. Heightened scrutiny is applied to review of capital murder convictions where the death sentence has been imposed. *Fulgham v. State*, 46 So.3d 315, 322 (¶ 16) (Miss. 2010) (citing *Bishop v. State*, 812 So.2d 934, 938 (¶ 7) (Miss. 2002)). "What may be harmless error in a case *1097 with less at stake [may become] reversible error when the penalty is death." *Id.* The standard of review for each issue will discussed throughout.

I. Whether the in-court and out-of-court identifications of Flowers by Porky Collins were constitutionally unreliable, and whether the trial court erred in overruling Flowers's objections to their admission.

¶ 20. Flowers claims that the trial court erred in admitting evidence of Porky Collins's out-of-court and in-court identifications of Flowers. Collins died in 2002, so his testimony from the 1999 trial was read to the jury. Collins's testimony was that, on the morning of the murders, he had seen two African-American men who appeared to be arguing outside Tardy Furniture. Collins thought the men were about to fight, so he circled the block and returned to see what was going on. The second time Collins saw the men, they were walking toward Tardy Furniture. Collins saw only one man's face when he drove past them.

¶ 21. After hearing about the murders at Tardy Furniture, Collins went to police the same day, reported what he had seen that

morning, and gave a description of the men. On August 24, 1996, police showed Collins two photo arrays with six photos each—the first group included Doyle Simpson's photograph; the second group included Flowers's photograph. Collins testified that he was not expected to identify the man whose face he did not see. According to police department notes, in response to the first photo array, Collins pointed to Simpson and said that he "looked like" the man he had seen, but he was unable to be positive. The entirety of the officer's handwritten notes were as follows:

Porky Collins

Picture Line-up 11:10 a.m.

# 1 and # 3 resembles, but hairline was further back

# 6 Pointed to Simpson said hairline like this, may have appeared a little darker.

"But it looks like him."

"Face was also same shape, round like this."

"Unable to be positive."

Collins then was shown the second photo array, and he identified Flowers as the man he had seen in front of Tardy Furniture. The officer administering the photo array made the following notes:

2nd Line Up

11:16 a.m.

Pointed to Curtis Flowers # 4

"I think that's him."

"He was about my height."

"I'm 5' 10"

"The complexion is also right."

"I believe that's him, it look[s] like him."

Identified # 4

I asked Porky if he knew Curtis Flowers, he said, "No. But I know the person I just identified is the person I saw in front of Tardy's 7–16–96."

During the 1999 trial, Collins identified Flowers in court as the man whose face he had seen outside Tardy Furniture. Flowers filed a pretrial motion to suppress Collins's out-of-court and in-court identifications, which the trial court denied. On appeal, Flowers claims that the trial court erred in admitting Collins's identifications into evidence.

[2] [3] [4]¶ 22. The standard of review for a trial court's suppression hearing findings regarding pretrial identifications is whether "substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *1098 *Butler v. State*, 102 So.3d 260, 264 (¶ 8) (Miss. 2012) (quoting *Gray v. State*, 728 So.2d 36, 68 (¶ 159) (Miss. 1998)). For an out-of-court or in-court identification to be excluded, "it must be the result of an impermissibly suggestive lineup *and* the identification must be unreliable." *Butler*, 102 So.3d at 264 (¶ 8) (citing *York v. State*, 413 So.2d 1372, 1383 (Miss. 1982)). First, the court must "determine whether the identification process was unduly suggestive." *Latiker v. State*, 918 So.2d 68, 74 (¶ 15) (Miss. 2005) (citing *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). Second, even if the identification process was unduly suggestive, the identification still can be admitted if "the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Id.*

A. Collins's Out-of-Court Identification

[5]¶ 23. Flowers claims that the out-of-court photo lineup was unduly suggestive because the photo array was skewed toward Flowers in several ways. He claims that his head was larger than the others and that the other men had lighter complexions, were younger than him, and had varying hairstyles and facial features. We have summarized the standard applied to out-of-court identifications as follows:

A lineup or series of photographs is impermissibly suggestive if "the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer." ... To be excluded, an out-of-court identification must have resulted from an identification procedure that was so impermissibly suggestive as to give rise to "a very substantial likelihood of misidentification." ... Where the defendant is "the only one depicted with a distinctive feature," courts usually will find the lineup to be impermissibly suggestive. ... On the other hand, "minor differences" with the suspects or differences in the photograph backgrounds will not render a lineup impermissibly suggestive. ...

*Butler*, 102 So.3d at 264-65 (¶¶ 9–11) (citations omitted). Applying the standard articulated in *Butler*, we recently held that a photo lineup was not impermissibly suggestive even though the defendant was the only person in the lineup with facial tattoos. *Stewart v. State*, 131 So.3d 569, 574 (¶ 16) (Miss. 2014). In *Stewart*, we concluded:

> We find that the case *sub judice* is similar to the cases of *White*, *Foster*, and *Jones*, in which this Court upheld similar identifications. In *White*, the witness noticed the defendant's plaited hair and forehead tattoo during the commission of the crime. *White v. State*, 507 So.2d 98, 99 (Miss. 1987). This Court upheld the out-of-court and in-court identifications of the defendant even though the defendant was the only suspect in the lineup with plaited hair. *Id.* at 99–101. The defendant also had a forehead tattoo, which the witness identified at trial. BI at 99–100. In *Foster*, this Court upheld the out-of-court and in-court identifications of the defendant even though he was the only person in the lineup wearing a fishing hat, where the defendant had worn a fishing hat during the robbery. *Foster v. State*, 493 So.2d 1304, 1305–06 (Miss. 1986). Likewise, in *Jones*, this Court upheld the out-of-court and in-court identifications of the defendant even though he was the only suspect in the photo lineup wearing a hat similar to the one worn by the attacker. *Jones v. State*, 504 So.2d 1196, 1199–1200 (Miss. 1987). This Court found that, even though the hat may have played a significant part in the identification, it was not impermissibly

*1099 suggestive, because the witness had given an accurate description and identified the defendant with great conviction at trial. *Id.* at 1200.

*Id.* at 573 (¶ 12).

¶ 24. In the photo array that included Flowers's photograph, Flowers's head is slightly larger than the others, as it appears his photo was taken from a closer angle than the others. However, the use of a different photographic technique creates only a minor difference, and that is not enough to render the photo lineup impermissibly suggestive. *Batiste v. State*, 121 So.3d 808, 856 (¶ 116) (Miss. 2013). The other characteristics Flowers claims caused the array to be suggestive are not present—three other men have complexions similar to Flowers's complexion; Flowers appears to be the same age or only slightly older than the other men; two of the other men have hair styles similar to Flowers's; and three of the other men have facial hair similar to his. Accordingly, Flowers fails to show that the lineup was unduly suggestive. Further, Collins provided a description to police on the day of the murders, and he was confident in his identification of the man he saw in front of Tardy Furniture. The trial court did not err in admitting Collins's out-of-court identification. Because the lineup was not impermissibly suggestive, we need not consider the *Biggers* factors for reliability.

B. Collins's In-Court Identification

[6]¶ 25. Although Flowers's issue statement asserts that Collins's in-court identification was "constitutionally unreliable," he provides no substantive argument or support for that claim. The extent of his argument is a footnote, which provides: "there is no issue of the admissibility of the in-court identification, given that Collins could not positively identify Flowers in the courtroom at the second trial, and was deceased by the time of this, the sixth trial." His assertion is incorrect. Collins unequivocally identified Flowers at the second trial. Flowers also implies that the typical jury consideration of determining Collins's credibility is not applicable in the case *sub judice* because his testimony was read to the jury, as opposed to live testimony. Although the jury did not personally observe Collins testifying, defense counsel's cross-examination of Collins adequately addressed credibility. For example, defense counsel asked Collins about his memory, any medication he was taking that could affect his memory, and whether he wore glasses. The characteristics of trial itself—trial by jury, an impartial judge, representation by counsel, and witnesses subject to an oath and cross-examination—adequately protect against any suggestiveness of in-court identifications at trial. *Galloway v. State*, 122 So.3d 614, 663 (¶ 164) (Miss. 2013).

¶ 26. Although Flowers does not claim that Collins's in-court identification was tainted by the alleged suggestiveness of the out-of-court identification, that is the argument often made by defendants. *See Butler*, 102 So.3d at 266–67. We have held that "an impermissibly suggestive pretrial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it, (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable* misidentification." *Id.* at 267 (¶ 17) (quoting *York*, 413 So.2d at 1383). Collins's out-of-court identification was not impermissibly suggestive; therefore, it could not give rise to the likelihood of an irreparable misidentification. For the reasons given above, the issue is without merit.

*1100 II. Whether the trial court's exclusion of expert testimony violated Mississippi law and Flowers's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

¶ 27. Flowers contends that the trial court erred by excluding the testimony of two experts—Robert Johnson and Dr. Jeffrey Neuschatz. Flowers tendered Johnson as an expert in criminal investigation procedures, but the trial court did not permit Johnson to testify. In Flowers's fourth trial, he filed a motion to determine the admissibility of Dr. Neuschatz's testimony on the reliability of eyewitness identification evidence. Flowers renewed the motion in the present case, and the trial court denied the motion.

[7] [8] [9] [10]¶ 28. We apply an abuse of discretion standard when reviewing the exclusion of expert testimony. *Gillett v. State*, 56 So.3d 469, 494 (¶ 61) (Miss. 2010). Analysis of the admissibility of expert testimony begins with Mississippi Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. The expert testimony must be both relevant and reliable to be admissible. *Gillett*, 56 So.3d at 495 (¶ 63). "Expert testimony is relevant if it will 'assist the trier of fact in understanding or determining a fact at issue.' " *Galloway*, 122 So.3d at 632 (¶ 27) (quoting *Ross v. State*, 954 So.2d 968, 996 (¶ 57) (Miss. 2007)). To determine reliability, the following nonexhaustive list of factors may be considered: whether the expert's theory can be or has been tested; whether the theory has been the subject of peer review and publication; the known or potential rate of error of the technique or theory when applied; the existence of standards to control the technique's operation; and the general acceptance the theory has garnered in the relevant expert community. *Gillett*, 56 So.3d at 495 (¶ 64) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 37 (Miss. 2003); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). "The applicability of these factors varies depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Gillett*, 56 So.3d at 495 (¶ 64) (citing *McLemore*, 863 So.2d at 37).

A. Robert Johnson

[11]¶ 29. Flowers attempted to call Robert Johnson as an expert in criminal investigation procedures, and the State objected. Johnson would have testified that the criminal investigation was flawed in various ways. After a lengthy voir dire, the trial court held that Johnson could not testify because "there is no valid way of testing the field of police investigatory techniques." The trial court also found that, even if Johnson's testimony met the reliability prong of *Daubert*, the testimony was cumulative because the law enforcement officers who already had testified at trial were throughly cross-examined and had admitted that there were flaws in the investigation. Flowers also attempted to have Johnson give an expert opinion relating to the photographic array shown to Collins. The trial court excluded the testimony *1101 because Johnson stated during his voir dire that he did not have sufficient information about the lineup.

1. Johnson's Proffered Testimony

¶ 30. During the voir dire, Johnson testified at length about his law enforcement experience. Johnson is currently a law enforcement consultant and previously served as police chief in Jackson, Mississippi; Jackson, Michigan; and Lansing, Michigan. He was Commissioner of the Mississippi Department of Corrections from 2000 to 2002. Johnson has a master's degree in public administration, and he graduated from the FBI National Academy and the FBI Law Enforcement Executive Development program. During his career, Johnson performed homicide investigations as a detective and directly supervised homicide investigations. Johnson also developed protocols for criminal investigations.

¶ 31. Johnson testified that generally accepted standards for homicide investigations exist, and he opined that the investigation in today's case failed to meet them in various ways. First, Johnson said the investigation lacked management and organization. In support of his contention, Johnson referred to the testimony of law enforcement officers who said the investigation was a "shared responsibility." Johnson also said the investigation lacked an in-depth case file, which should have included all original notes and reports. Johnson testified: "There has to be somebody who is the recipient of all the information coming from a variety of sources and is able to correlate that information and further direct the direction that the investigation needs to develop." He said that the investigation also lacked written

reports of events.

¶ 32. Johnson next criticized the crime scene integrity. Johnson said that the integrity of the crime scene could have been compromised by law enforcement officers and investigators meeting within the crime scene to discuss and organize the investigation. According to Johnson, a crime scene log should have been maintained listing who came and went from the crime scene to ensure that it was not contaminated. Next, Johnson testified that he was "concerned" about the investigation's early focus on one suspect—Flowers—to the exclusion of any other suspects. Johnson said early focus can result in lost evidence: "It's okay to very quickly focus on one suspect; that happens all the time, you know. But to the exclusion of all else and all others is where it becomes problematic, and you sometimes lose vital evidence that may be had because you haven't included and kept them in as a potential suspect or person of interest."

¶ 33. On cross-examination, Johnson admitted that Mississippi has no minimum standards for criminal investigations. He also admitted that the Justice Department guidelines he mentioned in direct examination were not requirements and that there are no national minimum standards for criminal investigations. Johnson stated that, rather than minimum standards, he based his opinions on generally accepted practices in police work. Further, when asked if he could provide an opinion on whether investigations that lack written reports lead to incorrect results, Johnson said investigations with written reports are "more complete." He did not, however, state that an investigation without a written report would lead to an incorrect result.

2. Admissibility of Johnson's Testimony

¶ 34. The *Daubert* factors apply to expert testimony relating to police investigatory techniques. *See* *Ross v. State*, 954 So.2d 968, 996–97 (Miss. 2007) ("*Ross I*"). •1102 In *Ross I*, the defendant proffered an expert who opined that the securing of the crime scene and evidence collection were deficient. *Id.* at 997 (¶ 61). Although the Court held the testimony did not meet the reliability standards of *Daubert* and *McLemore*, the opinion did not discuss why the testimony was unreliable. *Id.* The judgment was reversed and the case remanded for other reasons. *Id.* at 1019–20 (¶¶ 138–41). The defendant was convicted again and appealed, and the case was assigned to the Court of Appeals. *Ross v. State*, 22 So.3d 400 (Miss. Ct. App. 2009) ("*Ross II*"). In *Ross II*, the Court of Appeals addressed the proffered expert testimony and found that the trial court did not err in excluding the testimony. *Id.* at 420–21 (¶¶ 99–104). First, the expert testimony was cumulative because the investigating officers had been cross-examined about their investigative techniques and had admitted that "things could have been handled better." *Id.* at 421 (¶ 102). Second, the trial court did not abuse its discretion by finding that the testimony failed to meet the *Daubert* reliability prong because the expert's "memberships and associations were voluntary and fee based, not peer reviewed or tested" and "the trial court was unable to evaluate the value of [the expert's] certifications because the trial court was unaware of the requirements for certification." *Id.* at 421 (¶¶ 103–104).

¶ 35. Under Rule 702, the first prong of the inquiry for determining whether expert testimony should be admitted is whether the witness is "qualified by virtue of his or her knowledge, skill, experience[,] or education." *Galloway*, 122 So.3d at 632 (¶ 28) (quoting *McLemore*, 863 So.2d at 35). Johnson certainly is qualified through his knowledge, experience, and training in the field of criminal investigations. Further, there is no question that Johnson's testimony is relevant. Johnson's testimony addressed facts relating to the criminal investigation that eventually led to Flowers's arrest; thus, his testimony had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401.

¶ 36. The critical inquiry, however, is whether Johnson's testimony is reliable. The trial court focused on the inability to test Johnson's theories as a basis for excluding the testimony, holding: "Because there is no valid way of testing the field of police investigatory techniques, this Court finds the proposed testimony in the field fails to meet the reliability

standards required under Rule 702." Whether the expert's theory can be tested is one factor to be considered under *Daubert*, but it is not conclusive. Johnson's proffered testimony is not the typical expert testimony contemplated by the testing factor—for example, one cannot test what effect the lack of organization and leadership would have on a murder investigation. As such, reliance on the testing factor alone would have been error. However, the trial court cited other reasons for excluding the testimony.

¶ 37. The trial court also found that, although Johnson testified that the investigation fell below generally accepted standards and practices in law enforcement, Johnson did not sufficiently articulate the standards. *See McGee v. River Region Med. Ctr.*, 59 So.3d 575, 579 (¶ 13) (Miss. 2011) (An expert testifying about a failure to meet generally accepted standards must "identify and articulate the requisite standard that was not complied with.") A review of the proffered testimony reveals that Johnson did articulate standards relating to some—but not all—of his opinions. Johnson offered four opinions: (1) that the investigation lacked organization and management; (2) that the integrity of the crime scene was compromised; (3) that *1103 the investigation focused on one suspect too quickly; and (4) that the photo lineup used during Collins's identification was flawed. Johnson did not articulate a standard for his opinion relating to the investigation's early focus on Flowers as a suspect. And Johnson said that he was not familiar with the procedures used during Collins's identification. Thus, the trial court did not err in excluding his testimony. *See Dedeaux Util. Co., Inc. v. City of Gulfport*, 938 So.2d 838, 841 (Miss. 2006) (expert testimony must be based on sufficient facts and data).

¶ 38. Johnson did provide applicable standards for his opinions related to the investigation's organization and management and crime scene integrity. Regarding the investigation's organization and management, Johnson testified that, based on his experience and knowledge, the investigation should have had centralized leadership that collected information, maintained the case file, and directed the investigation. Johnson said, "There has to be somebody who is the recipient of all the information coming from a variety of sources and is able to correlate that information and further direct the direction that the investigation needs to develop." Regarding crime scene integrity, Johnson said a crime scene log should have been maintained at the crime scene. He explained that the crime scene can be contaminated, evidence can be overlooked, and evidence can be deposited after the crime. He said, "There may be a number of issues related to the presence of people at the crime scene, so you want to have a record of when they were there, how long they stayed and when they left."

¶ 39. Although Johnson provided some standards on which he based his opinions, we cannot say the trial judge abused his discretion when he held the standards insufficient. Johnson testified that the standards he applied in forming his theories were "generally accepted practices in police work." Certainly, expert testimony can be based on experience, and one factor that may be considered in determining reliability is general acceptance in the relevant expert community. *See Gillett*, 56 So.3d at 495 (¶ 64); *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. But Johnson did not provide support for his statement that the practices he referenced were, in fact, generally accepted. Allowing an expert simply to state that his opinions are based on "generally accepted practices," without support for the assertion, could lead to essentially permitting experts to qualify themselves. While Johnson's opinions and standards seem sensible, we cannot say that he presented enough evidence that his opinions were sufficiently reliable such that the trial court abused its discretion by not allowing the testimony.

¶ 40. Further, the trial court was correct that Johnson's testimony was cumulative. Law enforcement officers who participated in the investigation were thoroughly questioned about the investigation and admitted that there were flaws in the investigation. Specifically, officers admitted that a crime scene log was not maintained, and the police chief testified that one should have been maintained. The officers also admitted that there was not a lead investigator, and the police chief testified that responsibilities should have been assigned, an investigative plan should have been developed, and information should have been shared with investigators and first responders. The trial court did not commit an abuse of discretion in not allowing Johnson's testimony.

B. Dr. Jeffery Neuschatz

[12]¶ 41. During Flowers's fourth trial, he filed a motion to determine the admissibility of Dr. Neuschatz's testimony *1104 on the reliability of eyewitness identification evidence. Dr. Neuschatz's affidavit and *curriculum vitae* were attached to the motion. Dr. Neuschatz's affidavit essentially provided two opinions: (1) that Collins's identification of Flowers could have been affected by a number of different circumstances; and (2) that the identification procedure was flawed. Before the fourth trial commenced, the State announced that it would not seek the death penalty, and Flowers withdrew his motion regarding Dr. Neuschatz's testimony.[3]

¶ 42. At Flowers's fifth trial, the State sought the death penalty, and Flowers renewed his motion to determine the admissibility of Dr. Neuschatz's testimony. The court held a hearing on the motion, but Flowers did not provide a proffer of Dr. Neuschatz's testimony other than the affidavit previously submitted. The trial court denied the motion, holding that, because Collins was extensively cross-examined, the expert testimony would not assist the jury:

And he was extensively cross-examined, even into the most minute detail about issues concerning what path he took driving around town that morning. He stated in his testimony that he had a brief glimpse of who he believed to be Mr. Flowers.

There was—he was cross-examined about his ability to remember things. He was cross-examined about whether he had had difficulty with memory problems in the past. I mean I do not think there could be a more thorough cross-examination of a witness than was done with Mr. Collins.

So I think given the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witness identification would assist the jury in the least bit in this case.

The court also found that Flowers did not demonstrate that Dr. Neuschatz's testimony was reliable based on the *Daubert* factors. In the present case, Flowers renewed his motion on the admissibility of Dr. Neuschatz's testimony. The trial court denied the motion, adopting its ruling from the fifth trial.

¶ 43. Again, in determining whether expert testimony is reliable, the court may consider the following factors: whether the expert's theory can be or has been tested; whether the theory has been the subject of peer review and publication; the known or potential rate of error of the technique or theory when applied; the existence of standards to control the technique's operation; and the general acceptance that the theory has garnered in the relevant expert community. *Gillett*, 56 So.3d at 495 (¶ 64) (citing *McLemore*, 863 So.2d at 37, and *Daubert*, 509 U.S. at 592–94, 113 S.Ct. 2786). The admissibility of Dr. Neuschatz's testimony was addressed recently in *Corrothers v. State*, 148 So.3d 278 (Miss. 2014), *reh'g denied* (Oct. 23, 2014). In *Corrothers*, the Court applied Rule 702 and *Daubert* to Dr. Neuschatz's testimony concerning the reliability of eyewitness identification procedures and found that Dr. Neuschatz's testimony was unreliable:

> Dr. Neuschatz attempted to apply the principles and methodologies underlying his expertise in eyewitness identification to opine that [the eyewitness's] identification "could" be unreliable. But Dr. Neuschatz's opinions were undermined by his inaccurate and incomplete understanding *1105 of the facts on which he based his opinions and his complete lack of expertise on [the eyewitness's] brain injury. These deficiencies rendered his opinions so fundamentally unsupported that they could offer no assistance to the jury and amounted to nothing more than unsupported speculation. His testimony was unreliable, and there was no abuse of discretion in excluding it. We further note that Dr. Neuschatz's testimony was inconclusive and speculative because he did not offer his opinions to a reasonable degree of scientific certainty, but testified only that Josh's lineup identification "could" be unreliable and that in-court identifications "probably" are suggestive. Nor did Dr. Neuschatz submit any peer-reviewed publications supporting his principles and methodologies; the trial court had only the benefit

of Dr. Neuschatz's curriculum vitae and his testimony that his studies had been subjected to peer review and publication and were generally accepted in the relevant scientific community. These facts further support the exclusion of Dr. Neuschatz's testimony.

*Corrothers*, 148 So.3d at 297 (¶ 35).

**¶ 44.** In the instant case, the trial court applied the *Daubert* factors and held that Dr. Neuschatz's theories were not generally accepted and that he did not provide information about the rate of error or the principles and methods used. As to the first factor, Dr. Neuschatz's affidavit cited several tests that support his theory that exposure time, appearance change/disguise, and post-identification feedback may affect eyewitness identifications. However, he did not submit documentation of the tests. Regarding peer review and publication, Dr. Neuschatz's affidavit stated that he has "published several articles in peer reviewed journals, written peer invited chapters, and presented [his] research findings at regional and national conferences." Again, however, he did not provide the articles. The same was true in *Corrothers*. *Corrothers*, 148 So.3d at 297 (¶ 35). Dr. Neuschatz's affidavit did not mention anything relevant to the third or fourth factors—the known or potential rate of error of the applied theory and the existence of standards and controls—therefore, the factors were not satisfied. Finally, Dr. Neuschatz cited several articles and studies supporting his theories to show that his theory is accepted in the scientific community but again, the articles were not submitted.

**¶ 45.** Because Flowers did not provide an additional proffer of Dr. Neuschatz's testimony, we have no way of knowing whether Dr. Neuschatz could have offered further support for the *Daubert* factors if he had provided live testimony. We do not hold that every expert is required to submit every article or report on which he or she relies. However, here, the trial judge—in exercising his considerable discretion—found that the defense did not present sufficient evidence in support of Dr. Neuschatz's opinions. The trial judge did not abuse his discretion in concluding that the affidavit alone was insufficient to withstand the *Daubert* analysis and in denying Dr. Neuschatz's testimony.

[13]**¶ 46.** Dr. Neuschatz's affidavit included two opinions: that Collins's identification could have been affected by several factors and that the photo identification process was flawed. Regarding the photo array, the same issue was addressed in *Corrothers*, and we held that Dr. Neuschatz's testimony may have been more prejudicial than probative due to the risk of confusion. *Corrothers*, 148 So.3d at 297 (¶ 36). Allowing testimony from Dr. Neuschatz that the photo identification process was flawed, while also admitting evidence of the identification because the court determined *1106 that it was not impermissibly suggestive, could result in confusing the jury.[4] Thus, the trial court did not err in excluding Dr. Neuschatz's testimony about the photo-identification process.

**¶ 47.** As to Collins's identification, discussed at length *supra*, the judge held: "[G]iven the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witness identification would assist the jury in the least bit in this case." The quoted finding represents precisely the type of finding the trial judge is called upon to make. In determining the admissibility of expert testimony, the trial judge must determine whether the testimony will "assist the trier of fact" in understanding the evidence or issues, and the judge must be satisfied that the testimony is "more probative than prejudicial." *Corrothers*, 148 So.3d at 294 (¶¶ 24, 27) (citations omitted).

[14]**¶ 48.** We recognize that many courts admit expert testimony regarding eyewitness identification, and we do not hold that such expert testimony is *per se* inadmissible. Rather, we recognize that the decision of "whether to admit this testimony is squarely within the discretion of the trial judge[.]" *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986). In *Moore*, the Fifth Circuit explained that "the trial court should exercise its discretion in deciding whether or not to admit it and should balance the reliability of the testimony against the likelihood that the testimony would overwhelm or mislead the jury." *Id.* (discussing *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985)). The *Moore*

Court recognized that a trial judge's exclusion of expert eyewitness testimony was not harmful where "there was evidence indicating guilt apart from the eyewitness identification." *Id.* (citing *United States v. Smith*, 736 F.2d 1103, 1108 (6th Cir. 1984)). The *Moore* court wrote:

[I]n the present case we do not find that the district court abused its discretion in refusing to admit this evidence. We have earlier held and we now affirm that the decision whether to admit this testimony is squarely within the discretion of the trial judge and properly so. ... Although admission of expert eyewitness testimony is proper, there is no federal authority for the proposition that such testimony *must* be admitted. The district judge has wide discretion in determining the admissibility of this evidence, and we hold that the district judge did not abuse his discretion in this case.

In some cases casual eyewitness testimony may make the entire difference between a finding of guilt or innocence. In such a case expert eyewitness identification testimony may be critical. But this is not at all the situation in the case before us. Even if the eyewitness identifications of Lamberth and Holder are completely disregarded, the other evidence of guilt is overwhelming. ...

We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding *1107 the accuracy of that identification is admissible and properly may be encouraged. In the present case, we find no abuse of discretion in not admitting such evidence. This was not a case where casual eyewitness identifications were at all critical.

*Moore*, 786 F.2d at 1312–13 (internal citations omitted).

¶ 49. Like the eyewitnesses in *Moore*, Collins's identification was far from the only evidence of guilt in the instant case, and it cannot be labeled "critical." No fewer than seven other witnesses placed Flowers near Angelica Garment Factory, where Simpson's gun was stolen, and near Tardy Furniture on the morning of the murders. Collins's testimony was no different. He identified Flowers as a man he saw outside Tardy Furniture. Out of all of the witnesses, Collins was the only witness placing Flowers near the scene who did not know Flowers. The other witnesses provided even more credible testimony as they recognized Flowers by sight, having known him previously. If the case hinged on Collins's identification of Flowers, expert testimony on eyewitness identification may have been helpful to the jury. However, as in *Moore*, that was not the situation.

¶ 50. The trial judge made a rational and reasoned decision regarding the admissibility of Dr. Neuschatz's testimony based on the totality of the facts before him. We afford "the widest possible discretion" to a trial judge's determination on the admissibility of expert testimony, and "that decision will only be disturbed when there has been a clear abuse of discretion." *Smith v. State*, 925 So.2d 825, 834 (¶ 23) (Miss. 2006) (quoting *Logan v. State*, 773 So.2d 338, 346–47 (¶ 31) (Miss. 2000)). The trial judge's ruling on Dr. Neuschatz's testimony was not an abuse of discretion. The issue is without merit.

III. Whether the trial court erred in not excluding evidence of a single particle of gunshot residue found on Flowers's hand.

[15]¶ 51. Investigator Jack Matthews interviewed Flowers on the day of the murders and asked him to submit to a gunshot residue test. Flowers agreed to the test. A single particle of gunshot residue was found on the back of Flowers's right hand. Joe Andrews, a forensic scientist who analyzed the gunshot residue test, testified that three scenarios can result in the presence of gunshot residue on a person's hands: (1) the person actually fired a gun; (2) the person was in close proximity to a discharged gun; or (3) the person handled an object that had gunshot residue on it. At trial, Flowers moved to exclude the evidence concerning the gunshot residue, and the trial court denied the motion. Flowers contends that the trial court erred in admitting evidence that a particle of gunshot residue was found on his hand approximately

three hours after the murders were reported. Flowers claims that the prejudicial effect of the evidence greatly outweighed the probative value, so it was inadmissible under Mississippi Rule of Evidence 403.

[16]¶ 52. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Miss. R. Evid. 403. Applying Rule 403, the trial judge must conduct a balancing test to determine if the probative value of the evidence is "*substantially* outweighed by the danger of unfair prejudice[.]" *McGowen v. State*, 859 So.2d 320, 329 (¶ 29) (Miss. 2003). On appeal, we review a trial court's decision for abuse of discretion. •1108 *Stone v. State*, 94 So.3d 1078, 1085 (¶ 20) (Miss. 2012); *Baldwin v. State*, 784 So.2d 148, 156 (¶ 27) (Miss. 2001). We do not reweigh the evidence and conduct a new balancing test. "The question on review is not whether this Court would have admitted the evidence, but whether the trial court abused its discretion in doing so[.]" *Stone*, 94 So.3d at 1085 (¶ 20). *See also Baldwin*, 784 So.2d at 156 (¶ 27) (on appeal we "must simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence").

¶ 53. Flowers cites *Foster v. State*, 508 So.2d 1111 (Miss. 1987), in support of his argument. In *Foster*, the prosecution presented testimony that paint chips found on the victim's clothing were similar to paint chips found in the defendant's car. *Id.* at 1117. A chemist testified that the paint chips were "indistinguishable in color, texture, and inorganic chemical composition; and that they therefore could have had a common origin." *Id.* The State also presented evidence that the victim's stab wound was caused by a knife found in the defendant's car or one similar to it. *Id.* The Court characterized the testimony in *Foster* as "could have" testimony, which easily could mislead a jury, and held that the testimony was too speculative to be admissible. *Id.* at 1118. Thus, the Court held that the probative value of the testimony was substantially outweighed by the danger of misleading the jury. *Id.* at 1117–18.

¶ 54. We have distinguished *Foster* in other cases when the risks associated with "could have" testimony did not outweigh the probative value. In *McGowen v. State*, the Court held testimony that a victim's physical condition likely was caused by sexual assault did not result in unfair prejudice or jury confusion. *McGowen*, 859 So.2d at 334 (¶ 46). *McGowen* was distinguishable from *Foster* because the testimony in *McGowen* "did not employ or rely on phrases such as 'could have' or 'possible.' Rather, [the witness] merely testified as to the condition of [the victim's] body." *Id.* at 331 (¶ 36).

¶ 55. In the instant case, Andrews testified that the presence of gunshot residue could result from three scenarios, and Andrews's testimony was clear that the residue did not unequivocally prove that Flowers had fired a gun:

> Q: Now, you are not telling the jury, are you, that finding a single particle of gunshot residue says that any individual actually pulled the trigger on a firearm, are you?
>
> A: No, ma'am. The conclusions you can draw from finding and identifying the gunshot residue on the hands of the person are one of three conclusions: That person has discharged a weapon. That person has been in close proximity to a discharged weapon or that person has handled an object that has gunshot residue on it. Those are the three conclusions you can draw from a positive gunshot residue identification.
>
> ...
>
> Q: The fact that you found that single particle does not bring this jury or us one step closer to knowing [by] which one of these three means that gunshot residue particle got on Mr. Flowers's hand; is that correct?

A: Yes, ma'am, that's correct.

Andrews's testimony is distinguishable from the testimony contemplated in *Foster*. Andrews set out three events that could result in a person having gunshot residue on his hands. He clearly explained that the gunshot residue did not unequivocally show that Flowers had fired a gun. Because Andrews's testimony was clearly explained, there is little risk that the jury was confused or misled by the testimony. *1109 As such, the testimony was admissible under Rule 403, and the trial judge did not abuse his discretion in admitting it. The issue is without merit.

IV. Whether the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt, as mandated by the Fifth and Fourteenth Amendments to the United States Constitution and Section Fourteen of the Mississippi Constitution.

¶ 56. Flowers claims that the evidence produced at trial was insufficient to support the verdict. He attacks the sufficiency of the evidence from multiple angles: (1) lack of motive; (2) lack of evidence that Flowers knew Simpson kept a gun in his car; (3) lack of evidence that one person, acting alone, committed the murders; (4) lack of the eyewitness credibility; and (5) lack of probative value of physical evidence. Flowers contends that the instant case is one of circumstantial evidence rather than direct evidence; therefore, he argues that the State was required to meet a higher burden of proof.

¶ 57. At the end of the State's rebuttal, Flowers moved for judgment notwithstanding the verdict (JNOV). The trial court denied the motion. "A motion for JNOV challenges the legal sufficiency of the evidence." *Taylor v. State*, 110 So.3d 776, 782 (¶ 19) (Miss. 2013) (citing *Knight v. State*, 72 So.3d 1056, 1063 (¶ 24) (Miss. 2011)). We apply the following standard when reviewing the sufficiency of the evidence:

> When ruling on a motion for JNOV, the trial court must view all credible evidence consistent with the defendant's guilt in the light most favorable to the State. The Court will not disturb the trial court's ruling if the evidence shows beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction, and reversal is required. Thus, the Court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Taylor*, 110 So.3d at 782 (¶ 19) (internal citations and quotations omitted). Flowers was charged with four counts of capital murder with the underlying felony of armed robbery. Thus, the State was required to prove that Flowers killed each of the victims "without the authority of law by any means or any manner ... [w]hen done with or without any design to effect death, [while] engaged in the commission of the crime of ... robbery ...." Miss. Code Ann. § 97–3–19(2)(e) (Rev. 2014).

A. Burden of Proof

[17]¶ 58. Because Flowers claims that the burden of proof—and, consequently, the sufficiency of the evidence analysis—depends on whether the evidence is direct or circumstantial, we address burden of proof first. Flowers claims that the case is based on circumstantial evidence, not direct evidence. Therefore, he claims that the State must meet the following burden of proof:

> It is fundamental that convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the height which will exclude every reasonable doubt; that when in any essential respect the State relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis *1110 than that the contention of the State is true, and that

throughout the burden of proof is on the State.

*Westbrook v. State*, 202 Miss. 426, 32 So.2d 251, 252 (1947).

[18] [19]¶ 59. Flowers's case, however, is not a case of circumstantial evidence. If an eyewitness is produced or a statement from the defendant is admitted, the case is not circumstantial. *Rubenstein v. State*, 941 So.2d 735, 785 (¶ 225) (Miss. 2006); *Ladner v. State*, 584 So.2d 743, 750 (Miss. 1991). Further, a defendant's "admission of culpability ... to a third party who is not a law enforcement officer constitutes direct evidence of a crime." *Minor v. State*, 831 So.2d 1116, 1119 (¶ 9) (Miss. 2002) (citing *Ladner*, 584 So.2d at 750). In *Ladner*, the Court held that a case is not based only on circumstantial evidence even if the only direct evidence is a "jailhouse confession." *Ladner*, 584 So.2d at 750. *See also Foster*, 508 So.2d at 1115 (Court held that, without the jailhouse confession, the prosecution's case would have been entirely circumstantial), *overruled on other grounds by Powell v. State*, 806 So.2d 1069 (Miss. 2001).

¶ 60. Odell Hallmon, a jailhouse informant, testified that Flowers had told him that he had committed the murders. According to *Ladner*, a jailhouse informant's testimony is considered direct evidence, and when a jailhouse informant's testimony is present, the case is not circumstantial. *See Moore v. State*, 787 So.2d 1282, 1288 (¶ 18) (Miss. 2001) (discussing *Ladner*, 584 So.2d at 750). Following the Court's holdings in *Ladner* and *Moore*, the trial judge found that Hallmon's testimony provided direct evidence of the crimes. We hold that the trial judge did not err in applying the Court's precedent. Under *Ladner*, the case *sub judice* is not one of circumstantial evidence, and the *Westbrook* standard suggested by Flowers does not apply.

B. Sufficiency of the Evidence

[20]¶ 61. Flowers claims that the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt. Flowers asserts that the State failed to prove motive; that there was a lack of evidence that Flowers knew Simpson kept a gun in his car; that the evidence does not support the State's theory that the murders were committed by a single gunman; that the eyewitnesses were not credible; and that the physical evidence lacked probative value. First, although Flowers vehemently argues on appeal his theory that the number of victims and the placement of the gunshot wounds demonstrate that the murders were "almost certainly *not* a one-man crime," that theory was not presented at trial. Therefore, Flowers cannot raise it on appeal. *Lyons v. State*, 766 So.2d 38, 40 (¶ 7) (Miss. Ct. App. 2000) ("Failure to raise this defense waives the right of the appellant to raise it here.").

¶ 62. Regarding motive, Flowers claims that the State failed to prove that he was so aggrieved about being firing from Tardy Furniture that the firing resulted in his murdering four people. To support his contention, Flowers cites his statement given to the police shortly after the murders. Flowers told investigators that he had worked at Tardy Furniture for about three days at the beginning of July 1996. On his last day, Flowers improperly loaded large tractor batteries, and they fell off the truck and were damaged. Bertha Tardy told Flowers that the cost of the damaged batteries would be deducted from his paycheck. Flowers failed to return to work after the incident. After not reporting to work for several days, Flowers called Bertha Tardy and asked if he still had a job. Bertha Tardy told Flowers that he no longer had a job and that the majority of *1111 his paycheck was "covered up with [the] batteries." Flowers never stated that he was angry with Bertha Tardy for losing his job.

¶ 63. Flowers is correct that the State did not provide direct evidence of any anger toward the Tardy Furniture employees, but the State did provide evidence that Flowers had lost his job at Tardy Furniture and had his paycheck reduced as a result of the damaged batteries. A reasonable juror could conclude from that evidence—and it is in the jury's province to draw such inferences if reasonable—that Flowers had a motive to rob Tardy Furniture and kill four employees. *See Howell v. State*, 860 So.2d 704, 739 (¶ 125) (Miss. 2003) ("It is within the jury's province to draw reasonable inferences from facts based on experience and common sense.") (citing *Lewis v. State*, 573 So.2d 719, 723

(Miss. 1990)). The State's evidence supported the contention that Flowers had a motive.

¶ 64. Next, Flowers contends that the State's theory hinged on proving that Flowers knew he would find a gun in Simpson's car the morning of the murders, and he claims the State failed to prove that. He cites Simpson's testimony that Flowers did not know Simpson's gun was in his car on the morning of the murders:

Q. Your testimony was you did not recall agreeing and saying there was no way that Curtis Flowers would have known that gun was in the car that particular morning.

A. No. He, he didn't know it.

Q. He did not know it.

A. He did not know it.

Although Simpson stated at that point in his testimony that Flowers did not know the gun was in his car on the morning of the murders, Simpson had first testified that Flowers had seen the gun in Simpson's car previously. In a followup question regarding whether Flowers knew the gun was in his car that morning, Simpson confirmed that Flowers had seen the gun in his car before.

Q. So you had known [Flowers] pretty much forever.

A. Yes, sir. Yes, sir.

Q. Did he know that you had this pistol?

A. Yes, he did.

Q. Had he seen it in your car before?

A. Yes, sir.

...

Q. You were asked ... whether or not there was any way he knew the gun was in there that morning and your answer was that it wasn't; is that right?

A. That's right.

Q. But you were also asked how [Flowers] knew you kept a gun in your car, I believe. How did [Flowers] know you had had a gun in your car? Had he seen it in there before?

A. Yes, sir, he had.

¶ 65. Because Flowers previously had seen Simpson's gun in his car, the evidence supports the contention that Flowers knew he would find the gun in Simpson's car the morning of the murders. The jury, as "the ultimate finder of fact," is responsible for considering the evidence and weighing the credibility of witnesses, and the Court will not reweigh the evidence on appeal. *Conley v. State*, 790 So.2d 773, 807 (¶ 13) (Miss. 2001) ("We do not have the task of re-weighing the facts in each case and going behind the verdict of the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible."). Whether the jury believed that Flowers knew Simpson kept a gun in his car was one piece of evidence for the jury to consider.

*1112 ¶ 66. Flowers also attacks the credibility of the witnesses who placed him walking between his home, Angelica Garment Factory, and Tardy Furniture the morning of the murder. He asserts that the $30,000 reward for information lured the witnesses to testify. Several witnesses testified that they were aware a reward was being offered for information.[3] Some witnesses were not asked about the reward. Two of Flowers's fact witnesses, Latarsha Blissett and Kittery Jones, testified that investigators had implied that they would receive the reward if they provided statements implicating Flowers. The reward was never given. The jury heard testimony related to the reward, and Flowers's counsel argued during closing argument that investigators allegedly had tried to entice witness statements by offering the reward. The issue was within the jury's province of determining credibility. *See Taylor*, 110 So.3d at 784 (¶ 29).

¶ 67. Flowers also claims that testimony from people who saw him on the morning of the murders is not credible because the witnesses' testimony contains "irreconcilable differences." One difference Flowers cites is the witnesses' descriptions of his clothing. One witness testified that Flowers was wearing black windsuit pants; another said Flowers had on brown pants; and another thought Flowers wore white shorts. Flowers also points out that the times at which the witnesses claimed to have seen him at various locations in Winona overlap. For example, James Kennedy testified that he saw Flowers in front of his home at 7:15 a.m., but Katherine Snow said that she saw Flowers at Angelica at 7:15. Inconsistency in witness testimony is an issue of credibility for the jury. "It is within the jury's province to determine the weight and credibility to give to the evidence, resolving all conflicts in the evidence." *Taylor*, 110 So.3d at 784 (¶ 29).

¶ 68. Finally, Flowers claims that the physical evidence linking him to the murders lacks probative value. First, he argues that the bloody shoeprint found at the scene does not connect him to the crime, because another person could have come into the store after the murders and stepped on the bloody floor. His assertion lacks merit. The shoeprint was from a size ten-and-a-half Fila Grant Hill tennis shoe. Flowers wore a size ten-and-a-half shoe. A shoebox for size ten-and-a-half Fila Grant Hill tennis shoes was found in Flowers's girlfriend's home. Witnesses testified that they had seen Flowers wearing Fila Grant Hill shoes. Second, Flowers contends that the gunshot residue particle found on his hand has no probative value, claiming that it could have come from another source. As discussed above, Joe Andrews, a forensic scientist, testified that the gunshot residue found on Flowers's hand could prove one of three things: (1) he had discharged a weapon; (2) he had been in close proximity to a discharged weapon; or (3) he had handled an object that had gunshot residue on it. Although the gunshot residue could have come from another source (for example, coming in contact with an item at the police station), one alternative was that Flowers actually fired a weapon. Thus, the evidence does have some probative value.

¶ 69. The State responds to Flowers's claim that the evidence was insufficient by citing the following evidence linking Flowers to the murders: Flowers was fired from Tardy Furniture and was told he would not receive pay for his days worked. Flowers was seen standing next to Simpson's car—where the gun used in the murders was located—on the

morning of the murders. Numerous witnesses saw *1113 Flowers walking to and from Tardy Furniture on the morning of the murders. The shoeprint found at the crime scene matched Flowers's shoe size and matched a pair of shoes he had been seen wearing. Flowers tested positive for gunshot residue. The only paperwork that had been disturbed at Tardy Furniture was Flowers's paycheck and timecard. Cash was found hidden in Flowers's headboard after the murders. Hallmon testified that Flowers had confessed to committing the murders. When the evidence is viewed as a whole and in the light most favorable to the State, we conclude that any rational trier of fact could have found that the State had proved the essential elements of capital murder beyond a reasonable doubt. Accordingly, the issue is without merit.

V. Whether Flowers's right to a fair trial, as guaranteed by Mississippi law and the Fourteenth Amendment to the United States Constitution, was violated by the prosecution referencing facts not in evidence during the culpability phase closing argument.

[21] [22]¶ 70. Flowers claims that the prosecution improperly argued facts not in evidence during its culpability phase closing argument. During closing arguments, attorneys may "fairly sum up the evidence," comment on facts in evidence, and "draw whatever deductions and inferences" seem proper from the facts. *Rogers v. State*, 796 So.2d 1022, 1027 (¶ 15) (Miss. 2001); *Bell v. State*, 725 So.2d 836, 851 (¶ 40) (Miss. 1998) (citations omitted). We apply the following standard of review to attorney misconduct during opening statements and closing arguments: "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d 659, 661 (¶ 7) (Miss. 2001) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss. 1992)).

[23]¶ 71. "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow." *Goodin v. State*, 787 So.2d 639, 645 (¶ 18) (Miss. 2001) (citing *Acevedo v. State*, 467 So.2d 220, 226 (Miss. 1985)). However, we have held that, even if a prosecutor's statements during closing arguments are inconsistent with the facts, reversal is not warranted if the statements do not rise to the level necessary to endanger the impartial administration of justice and the fairness of the trial. *Pitchford v. State*, 45 So.3d 216, 233 (¶ 62) (Miss. 2010) (quoting *Goodin*, 787 So.2d at 645 (¶ 18)). In *Pitchford*, the prosecutor said that the defendant "went to the sheriff's department the same morning of the murder and he admitted it." *Pitchford*, 45 So.3d at 233 (¶ 62). The testimony, however, was that the defendant "talked to" an investigator. *Id.* Despite the inconsistency, the Court held that the statement did not result in an unfair trial. *Id.*

[24]¶ 72. Flowers claims that, during closing argument, the prosecution misstated facts about: (1) the time Sam Jones discovered the victims at Tardy Furniture; (2) Flowers's motive; (3) Porky Collins's response to the photo arrays; and (4) the location of the victims at the crime scene. The State correctly asserts that Flowers did not object contemporaneously to the statements during closing argument. Generally, even in death penalty cases, "the failure to object to the prosecution's statements in closing argument constitutes a procedural bar." *Ross I*, 954 So.2d at 1001 (¶ 71) (citing *Spicer v. State*, 921 So.2d 292, 309 (Miss. 2006); *Williams v. State*, 684 So.2d 1179, 1203 (Miss. 1996)). However, in some cases, we have considered the merits of the argument even where the defendant *1114 failed to object contemporaneously. *See Ross I*, 954 So.2d at 1002 (¶ 71) (citing cases).

[25]¶ 73. In *Flowers II*, we recognized plain error for misstatements by the prosecution in closing arguments. *Flowers II*, 842 So.2d at 550–56 (¶¶ 52–74). Therefore, because we found plain error on a similar issue in *Flowers II*, we proceed under a plain error analysis for the purpose of a thorough analysis. *Foster v. State*, 639 So.2d 1263, 1289 (Miss. 1994) ("defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal") (citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss. 1986)). To reverse under the plain error doctrine, an error must have occurred and that error must have "resulted in a manifest miscarriage of justice" or "seriously affect[ed] the fairness, integrity[,] or public reputation of judicial proceedings." *Conners v. State*, 92 So.3d 676, 682 (¶ 15) (Miss. 2012) (quoting *Brown v. State*, 995 So.2d 698, 703 (¶ 21) (Miss. 2008)).

A. Sam Jones's Arrival at Tardy Furniture

[26]¶ 74. Flowers claims that, during closing argument, the State misrepresented Sam Jones's testimony regarding the timeline of events on the morning of the murders. Jones died prior to Flowers's 2010 trial, so his testimony from the 2007 trial was read into evidence. Jones initially testified that he arrived at Tardy Furniture between 9:15 and 9:30 a.m. When the State questioned Jones about the timeline, the State's attorney misstated Jones's arrival time as being closer to 10:00 a.m. The State's attorney asked, "... when you got to the store, that was going to be closer on up to 10 o'clock, wasn't it?" Flowers's counsel objected to leading, but the judge overruled the objection. However, Jones never responded to the question. During closing argument, the State discussed the timeline and the attorney said: "Mr. Sam Jones came into the store slightly after 10:00 on the morning of the 16th and discovered the bodies." Flowers claims the statement was prejudicial because it skewed the timeline in the State's favor. Both Porky Collins and Clemmie Flemming testified that they had seen Flowers near Tardy Furniture around 10:00 a.m. Flowers claims that, if Jones's testimony that he arrived at the store between 9:15 and 9:30 had been described accurately, it would have raised a question in the jurors' minds about what Flowers was doing near the murder scene thirty to forty-five minutes after the murders could have occurred.

¶ 75. The State responds that, although Jones did not testify to arriving at the store at 10:00 a.m., other evidence presented at trial supported that position. For example, the 911 call reporting the murders was placed at 10:20 a.m., and Jones testified that he was in Tardy Furniture for ten to fifteen minutes before going to a nearby business to call for help. So, working backward, the conclusion could be drawn that Jones arrived at Tardy Furniture closer to 10:00 a.m., rather than 9:15 or 9:30. Further, the State claims that any misstatement relating to the time Jones arrived was harmless error, and the error was cured with the following comments by defense counsel in its closing statement:

> [Sam Jones] came in and you know, his testimony, I looked it up as they were saying that. His original testimony was he might have gotten there, started his voyage to go in to—as early as 9:00. He, he thought maybe he got there closer to 9:30. But we know from the police that the call came in at 10:20. And if you will remember, Mr. Jones also told you he thought it might have been 15 minutes before he recovered himself enough to go and actually make the report. So there is a bunch of time in there.

*1115 Sam Jones did not testify that he arrived at Tardy Furniture at 10:00 a.m. However, a reasonable inference could be drawn from the other evidence, including the 911 call, that Jones may have arrived closer to 10:00. Defense counsel's summary of the timeline in closing and the reasonable inference that could be drawn from the evidence as a whole preclude a finding of plain error on the issue.

B. Flowers's Motive

[27]¶ 76. Next, Flowers claims that the following statement by the prosecutor about Flowers's alleged motive was not based on facts in evidence:

> The investigators learned pretty quickly when they asked who in the world could have had some reason, some motive, some anything to attack four people like this.
>
> Have you had anybody that's had beef with the store? Just one. Well, that doesn't mean he did this though, does it? No. But you check that out. You look at him. And in the course of deciding what, if anything, Curtis Flowers had to do with this crime.

In his brief, Flowers claims that no evidence was presented to support the State's theory that Flowers was angry about being fired. To the contrary, the State identified several facts that supported the contention that Flowers "had beef" with Tardy Furniture: Flowers lost his job days before the murders. Bertha Tardy deducted the cost of damaged inventory from Flowers's paycheck. Police Chief John Johnson testified that the Tardy family considered Flowers a threat and that "they were concerned about their safety dealing with him." Investigator Jack Matthews testified Flowers was the

only employee who had been fired from Tardy Furniture in the last few years and was the only person with whom they had had any problems. Doyle Simpson testified that he had heard that Flowers had "problems" with Tardy Furniture. A reasonable inference could be drawn from the evidence that Flowers had ill will toward Tardy Furniture. We cannot say that the State's comment during closing rose to the level of plain error.

C. Porky Collins's Response to the Photo Lineups

[28]¶ 77. In his third assignment of error, regarding alleged misstatements by the prosecution, Flowers claims that the prosecutor misrepresented Porky Collins's response to the photo lineup that included Doyle Simpson's photograph. The misrepresentation was prejudicial to Flowers's defense, he claims, because his defense was based partially on the theory that Simpson committed the murders. Collins testified that he did not remember if he had identified Simpson as one of the men he had seen arguing outside Tardy Furniture. Notes taken by an investigator during the photo arrays provided that Collins had said that two of the individuals resembled one of the men but that the "hairline was further back." Investigator Wayne Miller testified that Collins had pointed to Simpson during the photo array and said he looked like the person, but he could not be positive. Collins was shown a second array of photos, and he definitively identified Flowers.

¶ 78. During closing argument, the State's attorney said the following about Collins's identification: "He said the guy ain't there. They took another six photographs and said look at this second set. He said that's him right there. ... You know, see if he is in there. No, he is not. Is he in the second group? Yeah. That's him right there." The State correctly reiterated that Collins had identified Flowers in the second photo array as one of the men he had seen arguing outside Tardy Furniture. While the State's statement that Collins had said "the guy ain't there" was not an *1116 accurate representation of Collins's response to the first photo array, the reality is that Collins did not identify Simpson. He said he could not be sure. He pointed to Simpson's photograph in the first array and said he "looked like" the man he saw but he was "unable to be positive." However, when Collins saw Flowers in the second array, he was positive. The prosecutor's statement was slightly inconsistent with the facts, but we cannot say that the comment rose to the level of plain error.

D. Location of the Victims at the Crime Scene

[29]¶ 79. Flowers contends that the prosecutor incorrectly described the location of the victims at the crime scene. The prosecutor stated during closing argument that Sam Jones had discovered "all four victims basically laying in a pile, in a group right at the front counter in Tardy Furniture Store." The evidence presented at trial, however, showed that three of the victims were lying a few feet apart from one another, while the fourth victim was a considerable distance away. Flowers argues that the prosecutor's statement was prejudicial because it aided in undercutting the theory that the murders were committed by more than one person. Essentially, Flowers claims that the idea of four victims "piled together" aligns with a one-person crime, whereas victims spread across a larger area paints the picture of a two-man crime. The State admits that the "lying in a pile" statement was incorrect, but the State points out that three of the four victims were lying close to one another. The State asserts that the statement did not prejudice Flowers. As previously mentioned, Flowers did not present the "two-man crime" theory to the jury. And Flowers does not claim that the prosecutor's statement prejudiced him in any other way. Applying the plain error doctrine, the statement may have been an error, but we cannot say that it resulted in a manifest miscarriage of justice or resulted in an unfair trial. *See* Conners, 92 So.3d at 682 (¶ 15).

E. Conclusion

¶ 80. We recognize that, in *Flowers II*, the prosecution's misstatement of facts during closing argument was one basis for reversal. *Flowers II*, 842 So.2d at 556 (¶ 74). In that appeal, Flowers cited approximately fourteen alleged misstatements. *Id.* at 555 (¶ 68). Taken together, the cumulative effect of the misstatements, along with several other errors, warranted reversal. *Id.* at 556, 564 (¶¶ 74, 104). In today's case, Flowers cites four statements made during closing argument that he claims were not supported by the evidence. The prosecutor's comments regarding Jones's

arrival time, Flowers's having "beef" with the store, and Collins's identification were supported by the evidence and/or were proper "deductions and inferences" drawn from the facts. *Rogers*, 796 So.2d at 1027 (¶ 15); *Bell*, 725 So.2d at 851 (¶ 40). The statement about the bodies being piled up was a misstatement, but it does not satisfy the standard for plain error. We reiterate that Flowers failed to object to the statements during closing, therefore, we apply the plain error doctrine on appeal. Plain error is not present, as we have only one misstatement, which did not result in a manifest miscarriage of justice or adversely affect the fairness of the proceedings. *Conners*, 92 So.3d at 682 (¶ 15). The issue is without merit.

VI. Whether the jury selection process violated Flowers's fundamental constitutional rights protected by the Sixth and Fourteenth Amendments, and whether the trial court erred in denying Flowers's *Batson* claims.

[30]¶ 81. Flowers claims that the State exercised its peremptory strikes in a *1117 racially discriminatory way by striking five African-American venire members after employing disparate questioning and citing pretextual reasons for the strikes. As previously mentioned, the Supreme Court issued an order granting Flowers's petition for a writ of certiorari and remanding the case "for further consideration in light of *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, [195 L.Ed.2d 1] (2016)." *Flowers*, 136 S.Ct. at 2157.

[31]¶ 82. An order granting, vacating, and remanding a lower court decision does not amount to a final determination on the merits. *Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012). Such an order "does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.* at 642. The Supreme Court often vacates a judgment and remands a case when it "believes that the lower court should give further thought to its decision in light of an opinion of [the Supreme] Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could possibly alter the decision of the lower court." *Flowers*, 136 S.Ct. at 2157 (Alito, J., dissenting).

¶ 83. The Court afforded Flowers and the State an opportunity to submit supplemental briefs on remand in accordance with the Supreme Court's order. Rather than point out how the Court should give further thought to its decision in light of *Foster* or explain how *Foster* changed or clarified the governing legal principles in a way that possibly could alter our decision, Flowers essentially re-urges the arguments he had raised in his most recent appeal.

¶ 84. Flowers contends that "[f]rom the beginning," the State's lead prosecutor Doug Evans engaged in a "relentless exclusion of African Americans from the juries[.]" Flowers's petition for certiorari to the Supreme Court raised the following question: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" Flowers argues that "the Supreme Court's remand for reconsideration requires this Court to reevaluate the evidence of pretext in light of the prosecutor's history of discrimination and dishonesty."

¶ 85. Flowers points out that, during his second trial, the trial court disallowed one of Evans's strikes because it had found it to be racially motivated. Flowers also points out that the Court said that Flowers's third trial presented us with as strong a *prima facie* case of racial discrimination as we had ever seen in the context of a *Batson* challenge. *Flowers III*, 947 So.2d at 935.

¶ 86. In *Flowers III*, the Court held that the prosecutor had violated *Batson* because the peremptory challenge exercised against juror Vickie Curry was clearly pretextual as there was no basis in the record for two of the grounds proffered by the prosecutor. *Id.* at 936. Moreover, the third ground was based on a relationship between Curry and Flowers that was "tenuous at best." *Id.* at 936. The Court also noted the trial court's erroneous statement that "the State has a right to exercise a challenge based on some of the answers from the other jurors as far as their peremptory challenge goes."

*Id.* The Court also held that the prosecutor's actions in striking juror Connie Pittman were "equally specious, as there [was] absolutely no evidence in the record to support the [the prosecutor's] proffered reason for striking her." *Id.* The Court classified the strikes of *1118 three other jurors as "suspect, as an undertone of disparate treatment exist[ed] in the State's voir dire of [the other three] individuals." *Id.* The Court concluded that, "[a]fter carefully reviewing the record before this Court and the applicable law, we find that the State engaged in racially discriminatory practices during the jury selection process and that the trial court committed reversible error in upholding the peremptory strikes exercised against Vickie Curry and Connie Pittman." *Id.* at 939.

¶ 87. As an initial matter, *Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations. Rather, the Supreme Court's decision in *Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's troubling jury selection file, which had a shocking focus on race. Nonetheless, we analyze *Foster* on our own to look for other issues that might place our original opinion in *Flowers IV* in error.

¶ 88. In *Foster*, petitioner Timothy Foster claimed that the prosecution used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury in his trial for capital murder, in violation of *Batson*. *Foster*, 136 S.Ct. at 1742. The trial court denied his claim, and the Georgia Supreme Court affirmed. *Id.* Foster renewed his *Batson* claim in a state habeas proceeding. *Id.* While the habeas proceeding was pending, Foster obtained copies of the file used by the prosecution during his trial through the Georgia Open Records Act. *Id.* at 1743–44.

¶ 89. The prosecution's jury selection file was replete with documents referencing race, including: (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in green, with a legend indicating that the green highlighting "represents Blacks"; (2) a draft of an affidavit prepared by an investigator at the request of the prosecutor, comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes identifying three black prospective jurors as "B# 1," "B# 2," and "B# 3"; (4) a typed list of qualified jurors with "N" (for "no") appearing next to the names of all five black prospective jurors; (5) a handwritten document titled "definite NO's" listing six names, including the names of all five qualified black prospective jurors; (6) handwritten document titled "Church of Christ" with notation that read: "NO. No Black Church"; and (7) the questionnaires filled out by several of the prospective black jurors, on which each juror's response indicating his or her race had been circled. *Id.* at 1744.

¶ 90. The state habeas court considered the prosecution's jury selection file but denied relief. *Id.* at 1745. The Georgia Supreme Court likewise denied relief, concluding that Foster's *Batson* claim was without merit because he had failed to demonstrate purposeful discrimination. *Id.* at 1745. The Supreme Court granted certiorari. *Id.* The Supreme Court reemphasized the familiar principle that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)). The Supreme Court also reaffirmed the well settled, three part process established in *Batson* for determining when a strike is discriminatory:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral *1119 basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

*Id.* (quoting *Snyder*, 552 U.S. at 476–477, 128 S.Ct. 1203).

¶ 91. The Supreme Court addressed only *Batson*'s third step because it was undisputed that Foster had demonstrated

a *prima facie* case and that the prosecutors had offered race-neutral reasons for their strikes. *Id.* at 1747. The third "step turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." *Id.* (quoting *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203).

¶ 92. Despite uncertainty about the background of particular jury selection notes obtained by Foster, the Supreme Court refused to blind itself to their existence. *Id.* at 1748. The Supreme Court "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 136 S.Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). "As [the Supreme Court has] said in a related context, 'determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available.' " *Id.* (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). "At a minimum, [the Supreme Court was] comfortable that all documents in the file were authored by someone in the district attorney's office. Any uncertainties concerning the documents [were] pertinent only as potential limits on their probative value." *Foster*, 136 S.Ct. at 1748.

¶ 93. Foster focused his *Batson* claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. *Id.* at 1748. The Supreme Court analyzed the prosecution's justifications for striking Garrett and Hood.

¶ 94. The Supreme Court determined that the prosecution's reasoning for striking Garrett was "not grounded in fact." *Id.* at 1748–49. Furthermore, the Supreme Court also discovered that the prosecution had made misrepresentations because several of the prosecution's reasons for why he struck Garrett were contradicted by the record. *Id.* at 1749–50. The Supreme Court also determined that other explanations given by the prosecution, while not explicitly contradicted by the record, were "difficult to credit" because the prosecution had accepted white jurors with the same traits that allegedly rendered Garrett an unattractive juror. *Id.* at 1750.

¶ 95. As for the other juror, Hood, the Supreme Court said that the prosecution's principal reasons for striking him "shifted over time, suggesting that those reasons may be pretextual." Moreover, the Supreme Court concluded that the prosecution's justifications could "only be regarded as pretextual" because the justifications were "implausible" and "fantastic." *Id.* at 1752–53 (citing *Miller–El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (holding that credibility can be measured by, among other factors, how reasonable, or how probable, the State's explanations are)). As for an alternative primary justification for striking Hood—his affiliation with the Church of Christ—the Supreme Court was persuaded by the record demonstrating that Hood's race was the true motivation for the strike, not his religious affiliation. *Foster*, 136 S.Ct. at 1753. The Supreme Court noted the prosecution's multiple mischaracterizations •1120 of the record that other prospective jurors, who were members of the Church of Christ, had been struck. *Id.* at 1753. The Supreme Court also said that "[t]he prosecution's file fortifies our conclusion that any reliance on Hood's religion was pretextual." *Id.* The Supreme Court also determined that "[m]any of the State's secondary justifications similarly come undone when subjected to scrutiny." *Id.*

¶ 96. The Supreme Court proceeded with its *Batson* analysis: "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 136 S.Ct. at 1754 (quoting *Miller–El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)). "With respect to both Garrett and Hood, such evidence is compelling." *Id.* at 1754. Not only was the evidence "compelling," there were "also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file." *Id.* "Considering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,' [the Supreme Court [was] left with the firm conviction that the strikes of Garrett and Hood were 'motivated in substantial part by discriminatory intent.' " *Id.* (quoting *Snyder*, 552 U.S. at 478, 485, 128 S.Ct. 1203).

¶ 97. The Supreme Court insisted that the contents of the prosecution's file plainly belied the State's claim that it had exercised its strikes in a "color-blind" manner. *Id.* In fact, the Supreme Court described the number of references to race in the prosecution's file as "arresting." *Id.* The Supreme Court held that "the focus on race in the prosecution's file plainly demonstrat[ed] a concerted effort to keep black prospective jurors off the jury." *Id.* The Supreme Court concluded that the "prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury[.]" *Id.* The Supreme Court reversed the judgment and remanded the case for further proceedings because "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." *Id.*

¶ 98. After reviewing Flowers's supplemental briefs, the only aspect of *Flowers VI* that Flowers takes issue with as it relates to *Foster* is that the Court did not expressly refer to the prosecutor's past *Batson* violations in our analysis of Flowers's *Batson* claim. Flowers claims that the Court did not follow the "totality-of-the-circumstances approach" used in *Foster*; rather the Court confined itself to evaluating each piece of evidence of pretext in isolation, affording the prosecutor the benefit of the doubt where the evidence was ambiguous. Flowers argues "although [Doug] Evans had distinguished himself as an especially willful and recalcitrant *Batson* violater," the Court "omitted that well-documented history from its assessment of the credibility of his facially neutral reasons."

[32] [33] [34] [35] [36]¶ 99. "[T]he State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89, 106 S.Ct. 1712. The Supreme Court in *Foster* reaffirmed the well established, three step process for determining when a strike is discriminatory as set out in *Batson*. *Foster*, 136 S.Ct. at 1747. When a defendant challenges a peremptory strike under *Batson*, the defendant must first "establish a *prima facie* case of discrimination in the selection of jury members." *Thorson v. State*, 721 So.2d 590, 593 (¶ 2) (Miss. 1998) (citing *Berry v. State*, 703 So.2d 269, 294 (¶¶ 94–96) (Miss. 1997) (citing *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712)). Then, the burden *1121 shifts to the State to demonstrate that the juror was struck for a nondiscriminatory, or race neutral, reason. *Thorson*, 721 So.2d at 593 (¶ 2). The defendant then has the opportunity to rebut the State's reason. *Id.* Finally, considering all of the evidence, the trial court must determine if the State "engaged in purposeful discrimination" or if the strike was made for a race neutral reason. *Id.* In other words, the trial court must determine whether the race neutral reasons given by the State were credible or merely a pretext for discrimination.

¶ 100. The Court has identified five indicia of pretext that should be considered when analyzing the race neutral reasons for a peremptory strike:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the challenged characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

*Manning v. State*, 765 So.2d 516, 519 (¶ 9) (Miss. 2000) (quoting *Mack v. State*, 650 So.2d 1289, 1298 (Miss. 1994)).

[37] [38]¶ 101. *Foster* did not alter the great deference given to trial judges. The third step of *Batson* "turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203). We give great deference to the trial court's determinations under *Batson* and will reverse only if the trial court's decision is clearly erroneous or against the overwhelming weight of the evidence. *Berry v. State*, 802 So.2d 1033, 1037 (¶ 9) (Miss. 2001); *Thorson*, 721 So.2d at 593 (¶ 4). "The trial court has a pivotal role in evaluating *Batson* claims." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). We have expounded on the standard of review afforded to trial judges regarding *Batson* findings as follows:

> When a *Batson* issue arises, the trial judge acts as the finder of fact. *Berry v. State*, 703 So.2d 269, 295 (Miss.

1997).... The race neutral explanations must be viewed in the light most favorable to the trial court's findings. *Id.* Trust is placed in a trial judge to determine whether a discriminatory motive drives the reasons given for striking a potential juror. *See Webster v. State*, 754 So.2d 1232, 1236 (Miss. 2000). The determination of discriminatory intent will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712[.] Thus, trial courts are given great deference in their findings of fact surrounding a *Batson* challenge. *Lockett v. State*, 517 So.2d 1346, 1350 (Miss. 1987)....

*Walker v. State*, 815 So.2d 1209, 1215 (¶ 12) (Miss. 2002).

[39]¶ 102. "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). "[T]he best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge[.]" *Id.* Moreover, race neutral reasons for peremptory challenges often invoke a juror's demeanor, making the trial court's firsthand observations of even greater importance. *Id.* The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor credibly can be said to have exhibited the basis for the strike attributed to the juror. *Id.* The trial court's "determinations •1122 of credibility and demeanor lie peculiarly within a trial judge's province[.]" *Id.* (citations and quotations omitted).

[40]¶ 103. "[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 136 S.Ct. at 1748 (citing *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). On the same note, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Foster*, 136 S.Ct. 1737, 1748 (citing *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555).

¶ 104. The Montgomery County clerk summoned a special venire of 600 potential jurors for Flowers's sixth trial. The initial venire consisted of forty-two percent African Americans and fifty-five percent whites.[5] After for-cause challenges, the venire consisted of twenty-eight percent African Americans and seventy-two percent whites. During jury selection, the State accepted the first African–American juror, then exercised six peremptory strikes, five of which were against African–American venire members. At the point when five African Americans were struck by the State, the trial court found that a *prima facie* case of discrimination existed. The State then provided race neutral reasons for the five strikes, and Flowers's counsel offered rebuttals for the State's reasons. Ultimately, the trial court found that the State's reasons were credible.

¶ 105. Essentially, Flowers is asking the Court to reevaluate the credibility of Evans's race neutral explanations for striking African Americans in the sixth trial. However, as we explained in *Flowers VI*, "the determination of discriminatory intent will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed." *Flowers VI*, 158 So.3d at 1047 (citing *Batson*, 476 U.S. at 98, 106 S.Ct. 1712).

¶ 106. Here, the trial court was asked on several occasions to consider historical evidence of *Batson* violations committed by Evans in previous trials of the case. Flowers's counsel even asked the trial court to preclude Evans from making peremptory strikes entirely based on his history of *Batson* violations in the case. Specifically, Flowers's counsel urged:

> And I would renew the motion with respect to—and I, I would now re-urge this, when I've not previously urged. We had in the last trial urged that should this jury—that the prosecutor be, be precluded from making peremptory strikes because so much of this—because there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this prosecution. It's happened

actually—the predecessor in *Flowers II*, in Harrison County, found a *Batson* violation and ruled a strike by the State. So that in two proceedings and on the basis of what has been a persistent pattern of simply, you know, asking things that are clearly, if not flatly race or at least race-based[.]

The trial court responded to Flowers's counsel's request:

> And as far as the motion to prohibit the State from using peremptory challenges, there is no basis for that. Absolutely none. If the State looks at potential jurors and feels that they have right reasons for using peremptory challenges, that is their right. That is each sides [sic] gets to make peremptory challenges. But because *Flowers III* was *1123 reversed on *Batson* is certainly no grounds for saying that they should now be denied the right to use peremptory. The Supreme Court of this State has certainly never said that on a retrial you could not use peremptory challenges, nor has the United States Supreme Court ever said that. And so you're pulling that motion totally out of thin air and without any basis in law or in fact for making it. So it's denied.

¶ 107. Flowers's counsel continued to argue the history of *Batson* violations in support of the *Batson* claim at trial:

> And we think it is, therefore, pretextual specific and particularly in light under—of the history of race discrimination in jury selection in this district and in this particular case found by the Mississippi Supreme Court in *State v. Flowers* after the third trial, the first one in this district.

Indeed, the trial court was presented with and rejected Flowers's present argument that he had advanced at trial. Flowers argued to the trial court:

> And I think that that is in *Flowers III*, what the Supreme Court of Mississippi said was that when you are looking at *Batson*, you look at the totality of the circumstances and you go beyond little excuses. And that the danger, certainly, in *Flowers III* is to devolve—for the *Batson* challenging process, to devolve into an effort of uncovering and coming up with facially neutral reasons that are merely a mask for actually racially discriminatory reasons, the desire to bleach or—I suppose, if it were the other way around darken or make male or make female, the jury and that the Court, considering the totality of the circumstances, cannot simply express this distinction. This is based on the 14th Amendment Equal Protection Clause. And there is a huge body of equal protection civil litigation. It is referred to by the United States Supreme Court in *Snyder*, the most recent case in which a verdict was reversed on *Batson* in the United States Supreme Court. And basically, the situation is that you may go behind the facial neutrality if anything in the record suggests that one or more of the reasons may be either unconnected and related to what is really a material issue in this case and/or appears to have been pursued with more vigor in an attempt to uncover some excuse that is of less than universal relevance.

Again, Flowers's counsel ensured that the trial court consider the totality of the circumstances, including historical evidence of racial discrimination by the district attorney.

> Again, we would cite the totality of the circumstances and the apparent cherry picking of the African–American jurors for scrutiny and attention. And in light of the history of racial discrimination by this district attorney's office in this district, we would say the totality of the circumstances makes this a pretext for discrimination and attempt to look for race-neutral reasons for racially motivated peremptory striking.

¶ 108. The trial court not only considered Flowers's counsel's argument in its consideration of the totality of the circumstances; the *Flowers* Court also considered other circumstances showing that Evans did not have discriminatory intent. The trial court certainly considered circumstances surrounding the previous trials as evidenced by its response to Flowers's *Batson* claim:

> But you know full well from past experiences in this county because of the number of people that know Mr.

Flowers, they know his parents, they know his brother, they know his sisters, and he I mean he has got a large number of *1124 siblings. And all of those people you know, I mean he is so well-known here that, you know, you've got a number of African–Americans that say I know him. I can't be fair. I know these people. I can't sit in judgment of their son. And there is there is no way to avoid that if this case is tried in this county. Because this is the same type things that, that occurred in the previous trials where he had so many people that knew him. You know, I don't—I hadn't kept a running count of anything in here but, you know, there is nothing that has—that has—no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family.

¶ 109. The prior adjudications of the violation of *Batson* do not undermine Evans's race neutral reasons as the despicable jury selection file in *Foster* had undermined the prosecution's race neutral explanations. We cannot say that the exceptional circumstances discussed in *Foster* are present in today's case so as to prevent the Court from deferring to the trial court's factual determinations. Moreover, we cannot conclude that the trial court's factual findings were clearly erroneous.

¶ 110. Flowers's post-remand briefs spend far more time re-urging the arguments from his original appellate brief than addressing *Foster* itself. Accordingly, Flowers appears to rely on *Miller–El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller–El II*) instead. In *Miller–El II*, the Supreme Court held "the appearance of discrimination [was] confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller–El's jury was selected." *Id.* at 253, 125 S.Ct. 2317. The Supreme Court said, "[w]e kn[e]w that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries[.]" *Id.* at 263, 125 S.Ct. 2317. The evidence of a specific policy of past discrimination in *Miller–El II* significantly differs from the evidence before the Court. The Court does not find Evans's past two adjudicated *Batson* violations overcome the deference owed to the trial judge's factual findings on which the Court's affirmance relies. The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller–El II*. *Miller–El II*, 545 U.S. at 266, 125 S.Ct. 2317 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror.").

¶ 111. We turn to address Flowers's arguments raised on appeal. Flowers claims that the State exercised its peremptory strikes in a racially discriminatory way by: (1) disparately questioning African–American jurors as compared to white jurors; (2) responding differently to African–American jurors' voir dire answers as compared to answers of white venire members; and (3) mischaracterizing the voir dire responses of African–American jurors. We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of Flowers's arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*.

A. Disparate Questioning

[41] [42]¶ 112. Flowers claims that the questioning of African–American and white jurors was so "starkly different" that the questioning led to purposeful discrimination. *1125 First, Flowers asserts that the State asked potential African–American jurors more questions during individual voir dire than potential white jurors. Flowers claims that all African Americans who were struck by the State were asked more than ten questions. That statement is not supported by the record. For example, the State asked Carolyn Wright, an African American against whom the State exercised a peremptory strike, only three questions. However, overall, the State did ask more questions of African–American jurors than of potential white jurors. The State responds that more questions were asked only when a potential juror's answers to voir dire questions were unclear or needed further elaboration. Disparate questioning is evidence of purposeful discrimination. *Miller-el v. Cockrell*, 537 U.S. 322, 344, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Manning*, 765 So.2d at 520 (¶ 15). However, evidence of disparate questioning alone is not dispositive of racial discrimination.

*Hughes v. State*, 90 So.3d 613, 626 (¶ 37) (Miss. 2012); *Manning*, 765 So.2d at 520 (¶ 15); *Berry*, 802 So.2d at 1039 (¶ 20).

¶ 113. Second, Flowers claims that the State did not question white venire members about their relationships with defense witnesses even though African–American jurors were extensively questioned about similar relationships. To support his argument, Flowers claims that, during voir dire examination by the trial court, four white venire members—Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester—stated that they knew defense witnesses. The record reveals that the potential jurors knew members of law enforcement, the Tardy family, and the victims; but they did not know members of the Flowers family. Of the white jurors who survived for-cause challenges, five knew members of Flowers's family. Four of them knew only one member of Flowers's family; the State did not follow up with them. Pamela Chesteen knew Flowers's father, mother, sisters, and a cousin. The State did not question Chesteen about the relationships during voir dire; however, the trial court asked Chesteen whether the relationships would affect her ability to serve as a juror, and she said they would not. Several African–American venire members were questioned about their relationships with Flowers's family, as will be discussed in detail in the following section. However, the State did not question all potential African–American jurors about their relationships with persons involved in the case. For example, Alexander Robinson, an African American who was selected to be a juror, stated that he knew Flowers's brother, but the State did not question Robinson about that relationship.

¶ 114. The State's assertion that elaboration and followup questions were needed with more of the African–American jurors is supported by the record. Most of the followup questions pertained to the potential juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial. The jurors who had heard little about the case, who said they would not be influenced by what they had heard, and who said they would not be influenced by relationships were asked the fewest questions. The jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty were asked more questions. Those issues are appropriate for followup questions.

¶ 115. We have held that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, *1126 be left to its sound discretion." *Howell v. State*, 860 So.2d at 726 (¶ 67) (quoting *Ballenger v. State*, 667 So.2d 1242, 1250 (Miss. 1995)). "The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors." *Howell*, 860 So.2d at 727 (¶ 70) (quoting *Stevens v. State*, 806 So.2d 1031, 1062 (¶ 140) (Miss. 2001)). The trial judge participated in voir dire, asking his own questions when necessary. Flowers was given ample opportunity to question jurors, rehabilitate jurors, and make challenges. That he had these opportunities is evidence of a fair and proper jury selection process. *See Howell*, 860 So.2d at 726 (¶ 69); *Stevens*, 806 So.2d at 1062 (¶ 139). There is no evidence of discrimination based on the number of questions asked alone.

B. Disparate Treatment of Individual Venire Members

¶ 116. Flowers also contends that the State: (1) responded differently to African–American jurors' voir dire answers compared to the answers of white venire members, and (2) mischaracterized the voir dire responses of African–American jurors. For the purpose of our analysis, the two issues are addressed together by discussing the African–American venire members who were struck from the venire by the State's use of peremptory strikes. We address the State's race neutral reasons for striking the jurors, as well as Flowers's arguments regarding each, which includes his contentions that the State mischaracterized the voir dire responses of the jurors and responded differently to them.

1. Carolyn Wright

[43]¶ 117. The State gave the following reasons for its peremptory strike of Carolyn Wright: (1) she knew several defense witnesses; (2) she was sued by Tardy Furniture for an overdue account; and (3) she had worked with Archie Flowers Sr. at Walmart. At the *Batson* hearing, Flowers offered rebuttals for the State's reasons, but the trial court held that the State's reasons for striking Wright were race neutral. The trial court summed up its finding by stating:

> If the only reason the State offered was that she knows some of these defense witnesses, then there might be something there. But the fact is knowing these defense witnesses that you're intending to call, plus the fact that Tardy Furniture had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her.

[44]¶ 118. One reason the State gave for striking Wright was that she knew multiple defense witnesses. In fact, Wright knew a total of thirty-four people who were involved with Flowers's case. Flowers argues that striking Wright because she knew several potential witnesses was pretextual because the State did not strike white jurors who were acquainted with multiple people involved in the case. Specifically, Flowers points to Pamela Chesteen, who knew thirty-one people involved in the case; Harold Waller, who knew eighteen people involved in the case; and Bobby Lester, who knew twenty-seven people involved in the case. We recognize that one of the indicia of pretext is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Manning*, 765 So.2d at 519 (¶ 9). However, the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext. *Hughes*, 90 So.3d at 626 (¶ 37) ("Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of *1127 the challenged juror does not demonstrate that the reasons assigned are pretextual.").

[45]¶ 119. The second reason the State gave for striking Wright was that she had been sued by Tardy Furniture. As a rebuttal to that reason, Flowers alleged at the *Batson* hearing that the State did not question white jurors about their accounts at Tardy Furniture. However, the court had asked all jurors during group voir dire if they had accounts at Tardy Furniture and if they had been sued by the store. The court found that the basis was race neutral because none of the white jurors had been sued by Tardy Furniture. On appeal, Flowers claims that the State mischaracterized Wright's litigation with Tardy Furniture by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. However, that does not change the fact that being sued by Tardy Furniture was a race neutral reason for striking Wright. Prior litigation is a race neutral reason for a preemptive strike. *See Webster v. State*, 754 So.2d 1232, 1236 (¶¶ 9–11) (Miss. 2000) (finding that potential juror's company being sued by defense attorney in previous and unrelated litigation was sufficient race neutral reason for peremptory strike).

[46]¶ 120. The State's third reason for striking Wright was that she worked with Archie Flowers Sr. at Walmart. At the *Batson* hearing, Flowers rebutted that reason by comparing Wright's working relationship with Archie to Chesteen, a teller at a local bank where members of the Flowers family were customers. The trial court found this to be a race neutral reason and found that Wright's working relationship with Archie was distinguishable from the professional relationship Chesteen had with the Flowers family. Chesteen worked at a local bank in Winona and stated that she knew Archie Flowers Sr., Lola Flowers, and Flowers's sisters from her work at the bank. We agree with the trial judge that a coworker relationship and bank employee/customer relationship are distinguishable. Further, the trial court stated that the Winona Walmart was the "smallest Wal–Mart ... in existence" that he knew of, implying that Wright and Archie certainly had known each other. The trial court also stated that no white jurors had reported working at Walmart with Archie. Being acquainted with the defendant's family is a race neutral reason for striking a juror. *Manning v. State*, 735 So.2d 323, 340 (¶ 32) (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family.") (citing *Porter v. State*, 616 So.2d 899, 907 (Miss. 1993)).

¶ 121. Flowers's claim that the State provided "no convincing reasons" for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy

Furniture. We also note that, on her juror questionnaire, Wright wrote that she previously had served as a juror in a criminal case involving the "Tardy Furniture trial." The State had multiple, credible, race neutral reasons for striking Wright, and the trial judge did not err in denying Flowers's *Batson* challenge as to the juror.

2. Dianne Copper

[47]¶ 122. The State cited the following reasons for its exercise of a peremptory strike of Dianne Copper: (1) she had worked with Flowers's father and sister; (2) she knew several members of the Flowers family; (3) she said she "leaned toward" Flowers's side of the case due to her relationships with the Flowers family; and (4) she knew several defense witnesses. Flowers offered rebuttal to the State's reasons by again asserting that the State had *1128 not challenged white jurors connected to people involved in the case. He also claimed that the State did not attempt to rehabilitate Copper after she said leaned toward Flowers. The trial court found the State's reasons to be race neutral, concluding that Copper's relationships were distinguishable from those of the white jurors who were not challenged and recognizing that other jurors had not said they favored Flowers as Copper did.

¶ 123. During voir dire, Copper was questioned about her relationships with members of the Flowers family, and she revealed the following: Copper once lived in the same neighborhood as the Flowers family. She had worked with Flowers's sister, Cora, at Shoe World for "a year or two." She also had worked with Flowers's father for "one or two years." Copper testified that she knew Flowers's mother, Lola, and his brother, Archie Jr. She also knew more than twenty other potential witnesses. Altogether, Copper knew at least thirty people involved in the case. The State asked Copper about her comment that knowing so many people connected to the case would make her lean toward Flowers:

Q. And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connection to all of these people. Is that correct?

A. It—it's possible.

Q. Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?

A. Yes, sir.

Q. And it would make it to where you couldn't come in here and, just with an open mind, decide the case, would it?

A. Correct.

At that point, Flowers's counsel attempted to rehabilitate Copper:

Q. ... What I'm trying to find out is just as you could put aside all the information you heard before about this case, could you not also put aside the fact—if you got picked as a juror, put aside the fact that you have met Mr. Flowers, that you know some other people in these cases and be fair to the Tardys, the Stewarts, the Goldens, and Rigbys, and make whatever decision or vote that you're going to make based on the evidence and the evidence only. Could you do that?

A. I feel like I could. But, you know, it—

Q. Is what you're saying—

A. Of course, it would make me, you know, feel uncomfortable. But if I had to do it, you know, I got to do what I got to do.

Q. Okay. So you're saying that—thank you. You're saying that you'll be uncomfortable. You'd prefer not to—I get the impression you're saying that you'd rather not be a juror. But if you got picked to be one, you would take the responsibility seriously, and you would follow the law and the rules that the Court give[s] you, and you would put aside anything that you are required to put aside and make your evidence and make your vote based on just the evidence you hear in the courtroom. Is that fair to say?

A. Yes, sir. That's correct.

Clearly, Copper knew several members of the Flowers family and she was uncomfortable serving on the jury. That reason alone is a sufficient race neutral reason to strike her. *Manning*, 735 So.2d at 340 (¶ 32). Further, we have recognized "living near the defendant" as a race neutral reason •1129 for a peremptory strike. *Lockett v. State*, 517 So.2d 1346, 1356 (Miss. 1987) (citing *Taitano v. State*, 4 Va.App. 342, 358 S.E.2d 590 (1987)).

¶ 124. On appeal, Flowers claims that the State mischaracterized Copper's statement that she "leaned toward" Flowers due to her relationship with the Flowers family, but a reading of the record shows that the State correctly described her voir dire testimony. The State made the following argument during the *Batson* hearing:

> And the reason I point that out, it's not just that she knows those witnesses, but that because of knowing the family and working with those two family members, she stated that that relationship would influence her. She later said that—well, she could have an open mind. And then she was equivocal back and forth. But because of all those relationships, she clearly stated, when I asked her, that they would influence her. She could not have an open mind, and she was leaning toward the Defendant's family.

The State's argument accurately reflected Copper's testimony, including the defense's attempt to rehabilitate her. Even more, defense counsel asked Copper if she would "rather not be a juror," and she agreed. The Court has recognized that reluctance to serve as a juror is a race neutral basis for a peremptory strike. *Hughes*, 90 So.3d at 626 (¶ 36) (citing *Lynch v. State*, 877 So.2d 1254, 1274 (¶ 59) (Miss. 2004)).

¶ 125. Flowers claims that the State's strike of Copper was pretextual because white jurors who knew several defense witnesses were not struck. As mentioned above, one indicium of pretext is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Manning*, 765 So.2d at 519 (¶ 9). However, like Wright, the number of acquaintances was not the sole reason given by the State for striking Copper, so the instant basis is not an automatic showing of pretext. *See Hughes*, 90 So.3d at 626 (¶ 37). Again, Flowers claims that the State did not provide any convincing reasons for striking Copper and, again, Flowers's claim is unfounded. Copper lived in the same neighborhood as the Flowers family, knew multiple members of the family, and had worked with Flowers's father and sister. She admitted that, in light of the relationships, she leaned toward Flowers in the case. Copper also said that she would rather not serve as a juror. All of the given reasons are race neutral reasons for a peremptory strike. The trial court did not err in denying Flowers's *Batson* challenge as to Copper.

3. Flancie Jones

[48]¶ 126. The State gave several reasons for the peremptory strike of Flancie Jones: (1) she was related to Flowers; (2) she was late for jury selection twice; (3) she provided inconsistent statements on her view of the death penalty; and (4) she lied on her juror questionnaire in an attempt to get out of jury service. The trial court found that the State had provided sufficient race neutral reasons for the strike.

¶ 127. In response to the State's first basis—that Jones is related to Flowers—Flowers claims that the State mischaracterized and exaggerated Jones's relationship with Flowers. The State described the relationship between the two as follows: "She is related to the defendant. She admitted that she was related—she was a cousin—or the defendant's sister, Angela Jones, is her niece. So she said she guessed she must be related to him. Well, I guess so. He would be her nephew." During voir dire, Jones said that Flowers was her "sister-in-law's sister's son." She also said that Flowers's sister was her *1130 niece. Jones's statements regarding her relationship to Flowers were confusing, but the trial court seemed to understand and concluded that Jones had more than one familial connection to Flowers. The trial court stated:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's sister. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

Although one may not typically describe the child of an in-law's sibling as a niece or nephew, Jones's own statement that Flowers's sister was her niece supported the State's position that Flowers was Jones's nephew. Flowers's contention that the State mischaracterized and exaggerated the relationship is without merit. And, again, being acquainted with the defendant's family is a race neutral reason for striking a juror. *Manning*, 735 So.2d at 340 (¶ 32).

¶ 128. The other reasons the State provided for its strike also are race neutral. Jones was late for jury selection on two days. For one of the days, Jones's excuse was that she had difficulty waking up early in the morning because she used to work nights. On the other day, Jones said she was late because she was looking for her jury questionnaire. Jones also provided inconsistent statements on her view of the death penalty, and she admitted that she wrote on her questionnaire that she was against the death penalty in an effort to get out of jury service:

Q: ... And I think on your questionnaire, you said you were strongly against the death penalty.

A: I guess I'd say anything to get off.

Q: Okay. Well, are you saying that you didn't tell the truth?

A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.

Q: Well, I want to know when you put down you were strongly against the death penalty—

A: I was trying to not be—I—really and truly, I don't want to be here. I'll say it like that.

...

Q: When you put down that you strongly didn't believe in the death penalty, were you being truthful?

A: No ....

Being late on two days, lying on her questionnaire, and blatantly saying that she did not want to be there and that she would "say anything to get off" reflect an overall attitude of contempt toward jury service.

¶ 129. Jones's late arrival and her attitude toward jury service, evidencing a lack of concern about or commitment to the proceedings, are two race neutral reasons for a peremptory strike. *See* *Lynch*, 877 So.2d at 1274 (¶ 59) (reluctance to serve was a race neutral basis for a peremptory strike); *Brewer v. State*, 725 So.2d 106, 122 (Miss. 1998) (fact that the juror "had attempted to get off jury duty from the start" was a race neutral reason); *Lockett*, 517 So.2d at 1351–52 (striking of jurors based on attitude toward jury service is race neutral). In *Lockett v. State*, the Court provided a nonexhaustive list of race neutral reasons that had been recognized by other courts. The Court cited a Seventh Circuit case in which the court upheld the peremptory strike of a juror who arrived late and was inattentive, which indicated "a lack of commitment to the importance of the proceedings." *Lockett*, 517 So.2d at 1356 (citing *U.S. v. Mathews*, 803 F.2d 325, 331 (7th Cir. 1986)). *See also* *Hicks v. State*, 973 So.2d 211, 220 (¶ 28) (Miss. 2007) (inattentiveness is a race neutral reason). *1131 Unquestionably, Jones's attitude toward jury service was a proper race neutral reason for striking her.

¶ 130. The State did not misrepresent Jones's relationship with Flowers, and the State provided several race neutral reasons for striking her. Flowers's claims regarding Jones are without merit. The trial court did not err in denying Flowers's *Batson* challenge regarding the juror.

4. Tashia Cunningham

[49]¶ 131. The State's reasons for striking Tashia Cunningham included: (1) her working relationship with Flowers's sister, and (2) her wavering statements about the death penalty. At the *Batson* hearing, Flowers attempted to rebut by pointing to Cunningham's testimony that she could be a neutral juror and could set aside her relationship with Flowers's sister. Flowers compared Cunningham to Chesteen, who knew Flowers's family from the bank. Finally, Flowers claimed that Cunningham's alleged wavering views on the death penalty were similar to the views of white jurors. The trial court held that the State's reasons were race neutral, concluding: "Ms. Cunningham's all-over-the-map response to the death penalty, plus her situation about working so closely with Mr. Flowers's sister, in my mind, the State has shown race-neutral reasons for that strike."

¶ 132. During voir dire, Cunningham said she did not have a close relationship with Flowers's sister, Sherita Baskin. She said they had a "working relationship." Cunningham said she and Baskin had worked the same shift for two or three years, but they did not see each other every day at work. Cunningham said she worked at the end of the assembly line, and Baskin worked at the front of the line. The State asked Cunningham further questions about that relationship:

Q: And you work with the Defendant's sister, Sherita Baskin?

A: Yes.

Q: Now, the other day, I think you said that you do not work close to her?

A: No, I do not.

Q: Would you think about that for a minute?

A: I do not.

Q: Are you sure that you do not work side by side with her?

A: No, I do not.

Q: And you're saying that under oath?

A: Yes, sir.

The State then called Cunningham's employer, ADP, to confirm her testimony relating to her working relationship with Baskin. An ADP quality control clerk, Crystal Carpenter, testified that Cunningham and Baskin worked on the same assembly line with twenty-five to thirty-five people. Carpenter testified that Cunningham and Baskin worked side-by-side, "nine or ten inches" apart from one another. Carpenter testified that she saw the women working every day and that her testimony was based on her personal observations. Flowers's counsel asked Carpenter if there was documentation supporting the location of Cunningham and Baskin on the assembly line, and Carpenter said she could provide documentation supporting her testimony. Apparently, Carpenter did not provide the documentation. Thus, Flowers claims that the instant basis for the State's peremptory strike is unfounded. Flowers's claim is without merit.

¶ 133. We hold that the blatantly conflicting testimony of Cunningham and Carpenter was a race neutral basis for the State's challenge, as concern about a juror's honesty constitutes a race neutral reason. *See* Collins v. State, 691 So.2d 918, 927 (Miss. 1997) (a juror will be disqualified for withholding substantial information•1132 or misrepresenting material facts); *Mack*, 650 So.2d at 1300 (State's challenge upheld where the juror failed to reveal that her husband had pending charges against him); *Foster*, 639 So.2d at 1280 (as to one juror, the State said "his demeanor was such that I did not feel that he was being perfectly honest with us" and the Court held that the State had provided race neutral reasons). *See also Aguilar v. State*, 847 So.2d 871, 877 (¶ 14) (Miss. Ct. App. 2002) (concern that juror was being dishonest was a valid reason).

[50] [51]¶ 134. The State cited Cunningham's wavering views on the death penalty as a second basis for its peremptory strike. On her juror questionnaire, Cunningham marked that she had "no opinion" on the death penalty but, on the very next question, she marked that she would not consider the death penalty under any circumstances. During voir dire by the trial court, Cunningham first said she "would not" consider the death penalty and that she "did not believe in the death penalty." She confirmed for the court three times that she would not consider the death penalty. However, as questioning continued, Cunningham wavered, saying she "might" be able to consider it. During voir dire by the State,

Cunningham went back to her initial position that she did not think she could consider the death penalty. Then, when questioned by defense counsel, Cunningham said that she could consider both life in prison and the death penalty. We have held that "having doubts as to one's ability to follow the law and vote for the death penalty when appropriate is a sufficient race-neutral reason." *Manning*, 735 So.2d at 340 (¶ 31) (citing *Johnson v. State*, 529 So.2d 577, 584–85 (Miss. 1988)). Further, providing inconsistent statements is a race neutral basis for striking a juror. *Hicks*, 973 So.2d at 220 (¶ 27); *Lynch*, 877 So.2d at 1272 (¶ 51) (verbal responses and juror's card were inconsistent).

¶ 135. During the *Batson* hearing, Flowers's counsel attempted to compare Cunningham to Jeffery Whitfield, a white juror who had "mixed feelings about the death penalty." Unlike Cunningham, Whitfield never said that he would be unable to impose the death penalty. We have recognized that a juror's views on the death penalty may provide a race neutral basis for a peremptory challenge. *See Batiste*, 121 So.3d at 848; *Pitchford*, 45 So.3d at 229 (¶ 40); *Flowers III*, 947 So.2d at 920–21. In *Flowers III*, the Court held that striking an African American who had "virtually indistinguishable" views on the death penalty as white jurors who were not struck raised an inference of discrimination, although, standing alone, it did not warrant finding a *Batson* violation. *Flowers III*, 947 So.2d at 921. In the instant case, no white jurors survived for-cause challenges who had views on the death penalty comparable to Cunningham's views. Thus, this basis was not pretextual. Cunningham's seeming dishonesty about her relationship with Baskin, her doubt about whether she could impose the death penalty, and her inconsistent statements about the death penalty are all race neutral reasons for a peremptory strike. The trial court did not err in denying the *Batson* challenge as to Cunningham.

5. Edith Burnside

¶ 136. The State gave the following reasons for striking Edith Burnside: (1) she knew Flowers and members of his family; (2) she was sued by Tardy Furniture; and (3) she had provided inconsistent statements regarding her views on the death penalty. As discussed above, during group voir dire, the trial court asked the entire venire if anyone had been sued by Tardy Furniture. Thus, again, Flowers's claim that only African–American venire members *1133 were asked about prior litigation is incorrect. Burnside responded in the affirmative, telling the court that she had been sued by Tardy Furniture. She later explained that she had paid the amount she owed and that the litigation had arisen from a misunderstanding about her account after the murders.

[52]¶ 137. At the *Batson* hearing, the State incorrectly stated that a garnishment had been issued against Burnside. The prosecutor said: "She also was sued by Tardy Furniture, and a garnishment was issued against her. She tried to deny that and said that she just settled with them when she came back but she was, in fact, sued by them." In response to the trial court's question about being sued by the store, Burnside had said: "I had an account there, but I was not sued by Ms. Bertha. It was later on when it was took over by Mr. Frank and Roxanne." During individual voir dire, Burnside confirmed that she was sued by Bertha Tardy's son-in-law, but that she had paid him and they "never had a falling out about it." She said the lawsuit would not cause her any difficulty in Flowers's case. Like the State's characterization of Wright's litigation with Tardy Furniture, the statement that Burnside's wages had been garnished and that Burnside had denied it was not supported by the record. However, prior litigation is a race neutral basis for a peremptory strike. *Webster*, 754 So.2d at 1236 (¶¶ 9–11).

[53]¶ 138. Another reason the State gave for striking Burnside was her relationships with Flowers and his family. Burnside said that she had once lived near the Flowers family, and Flowers and his sister used to visit her home. Flowers was a friend of Burnside's sons and played football with them. Burnside said that the relationships would not affect her ability to serve as a juror. No white venire members had relationships remotely comparable to the relationships Burnside had with Flowers and his family. A juror's relationships with the defendant's family is a race neutral reason for a peremptory challenge. *Manning*, 735 So.2d at 340 (¶ 32). And, again, "living near the defendant" is a race neutral reason for a peremptory strike. *Lockett*, 517 So.2d at 1356. If simply living near the defendant is a valid reason, then certainly the defendant having visited the juror's home and having been a friend to her children is a valid,

race neutral reason. Although Burnside said her connections to the Flowers family would not affect her jury service, the basis is not pretextual.

[54] 139. Finally, the State cited Burnside's statements regarding whether she could judge another person and whether she could impose the death penalty as bases for its peremptory strike. During voir dire, Burnside testified as follows:

Q: ... And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?

A: That I don't think I could do. I don't know if I could do that. ... I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

Q: And can you explain further your views on that?

A: I've just never been put in that predicament. I've always just don't know if I could do that. It's just the best way I can explain it. I just don't think I could do that.

Q: Again, let me explain. You're not committing to do it or not to do it. You're just—we just need to know if that's something that would be in your mind where you could think about it and you could consider the possibility of it.

A: I could think about it and consider it. That's all I could say.

*1134 Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?

A: If I was on there, yeah, I guess I'd have to.

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Q: Also, if he did not receive that death sentence—if he was convicted and the jury did not impose the death sentence, ... [he] would receive the sentence of life without parole. So is that a sentencing option that you could consider, also?

A: Yes, I could consider that.

Q: And so you would consider and have an open mind as to both sentencing options then; is that correct?

A: Yes, sir.

Burnside eventually said she could consider both sentencing options, but later she said again that her reservations about judging another person would affect her ability to serve as a juror:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But then when they come back and say could I be fair. My thing is I prefer not to judge anyone. But no, I will be fair.

Q: All right. Who will you be fair to?

A: I will be fair to whoever evidence is presented. I will be fair. Because I would want somebody to be fair to me or my children or my family. That the only way I can explain it.

...

Q: So you have changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in the case; is that right?

A: It could, possibly, yes, sir.

Flowers's counsel attempted to rehabilitate Burnside:

Q: Ms. Burnside, if you got picked on the jury, you would be fair to both sides, wouldn't you?

A: Yes, sir.

Q: And despite the fact that you don't like to judge, if you got picked you would, in fact, judge and be fair to both sides; is that correct?

A: Yes, sir, that is correct.

¶ 140. A juror's views on the death penalty and hesitation about serving as a juror are race neutral reasons for peremptory challenges. *See* *Batiste*, 121 So.3d at 848; *Hughes*, 90 So.3d at 626; *Flowers III*, 947 So.2d at 920–21. Further, there were no white jurors in the venire whose views and hesitation regarding judgment were comparable to Burnside's views. Although Flowers's counsel did rehabilitate Burnside, her remarks unquestionably were a race neutral basis for the challenge. The trial court did not err in denying the *Batson* challenge as to Burnside, as the State provided multiple race neutral reasons for striking her.

C. *Batson* Conclusion

¶ 141. We hold Flowers's claim that the trial court erred in denying his *Batson* *1135 challenges to be without merit. While the State did ask more questions of potential African–American jurors than white jurors, disparate questioning alone is not dispositive of purposeful discrimination. *Hughes*, 90 So.3d at 626 (¶ 37); *Manning*, 765 So.2d at 520 (¶ 15); *Berry*, 802 So.2d at 1039 (¶ 20). Further, the State's contention that the additional questions were asked to clarify and follow up on certain issues is supported by the record. The State provided multiple race neutral reasons for the peremptory strikes against each of the five African Americans. The evidence indicates that the race neutral reasons were valid and not merely pretextual.

¶ 142. The "exceptional circumstances" present in *Foster* and *Miller–El II*, which prevented the appellate courts' deference from being given to the trial court's factual determinations, are not present in the case *sub judice*. In *Foster* and *Miller–El II*, the record demonstrated a policy to exclude prospective African–American jurors, which completely undermined the race neutral explanations urged by the prosecution for exercising their strikes. *See* *Foster*, 136 S.Ct. 1737; *Miller–El II*, 545 U.S. 231, 125 S.Ct. 2317. Similar evidence undermining the prosecution's explanations simply is not present in the case *sub judice*. Taking into account the "historical evidence" of past discrimination, *i.e.*, Evans's past *Batson* violations, the Court remains unpersuaded that the trial court erred in finding that the State did not violate *Batson*. Accordingly, the trial court did not err in denying Flowers's *Batson* challenges.

VII. Whether the venire was biased, resulting in an unfair trial, such that reversal and remand for a new trial is warranted.

¶ 143. Flowers raises two subissues related to alleged bias in the venire and empaneled jury: (1) whether the jury did not adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (2) whether the pervasive bias in the venire infected the fairness of the proceedings, requiring reversal and remand for a new trial. Flowers implies that African–American jurors either were afraid to serve as jurors or were afraid to find Flowers not guilty as a result of the alleged pervasive racial bias in Montgomery County.

A. Adequate Deliberations

[55]¶ 144. The jury deliberated for twenty-nine minutes during the guilt-or-innocence phase and for an hour and a half during the sentencing phase. Our cases support that the time spent deliberating was adequate. In a capital murder case, we have held that a ten-minute guilt-or-innocence deliberation and a one-hour sentencing deliberation were adequate. *Gray*, 728 So.2d at 62–63. The well-settled rule is that "there is no formula to determine how long a jury should deliberate." *Id.* at 62 (¶ 125) (quoting *Smith v. State*, 569 So.2d 1203, 1205 (Miss. 1990)). In *Smith v. State*, we explained:

Because the jury's time of considering their verdict did not exceed seven minutes, it does not follow that the jurors did not carefully consider the testimony and the exhibits. It is not only possible but probable that when the state and the defendant had rested and the summations had been made each juror had decided in his mind the issue of innocence or guilt. After the brief deliberation with each other, the jurors found that they were of a single mind as to the guilt or innocence of the appellant and found him to be guilty.

*1136 Under the facts of this case this Court is unwilling to lend its authority to the establishment of any formula or guideline relating to the time a jury must deliberate before delivering its verdict. This Court is cognizant of the fact that in the past in occasional cases, as in the case at bar, rather brief deliberations have taken place in the jury room and verdicts have been returned with unusual rapidity. There is no yardstick of time which a jury should use before reaching a verdict. No two cases are similar as to facts and therefore the law varies in its application thereto. Therefore, we cannot hold that in the time utilized by the jury it could not reach a proper verdict of guilty.

*Smith*, 569 So.2d at 1205 (quoting *Johnson v. State*, 252 So.2d 221, 224 (Miss. 1971)). Based on length of the deliberations alone, Flowers's argument that the jury's deliberation was inadequate has no merit. However, Flowers's argument is not based solely on the length of time. He contends that the short amount of time spent deliberating is indicative of racial bias in the jury and venire.

B. Biased Venire

[56]¶ 145. Flowers claims that he was denied the right to a fair trial because the jury was biased. "The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and state constitutions." *Johnson v. State*, 476 So.2d 1195, 1209 (Miss. 1985). The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI. Likewise, the Mississippi Constitution provides: "In all criminal prosecutions the accused shall have a right to ... a speedy and public trial by an impartial jury of the county where the offense was committed." Miss. Const. art. 3, § 26. We have recognized that the right to a trial by an impartial jury and the right to a trial in the location where the offense occurred can be at odds with one another. *See Johnson*, 476 So.2d at 1210.

¶ 146. Flowers takes several approaches to support his contention that he was denied the right to a fair trial because the jury was biased. He asserts that: (1) racial bias in the community is evident by the Court's opinion in *Flowers III*; (2) racial bias and tension was demonstrated by the arrest of two African Americans for perjury during one of Flowers's previous trials; (3) excessive law enforcement personnel were present at the trial; (4) a majority of the jurors empaneled were acquainted with either Flowers or the victims or had formed opinions related to the case prior to trial; (5) the trial court erroneously denied several of Flowers's challenges for cause; (6) the trial court erred by failing to quash the entire venire; and (7) the jury interrupted an important mitigation witness. To cure the alleged biases, Flowers claims that the trial court should have quashed the venire or, in the alternative, provided for a "cooling-off period" until an unbiased jury from Montgomery County could be empaneled.

[57]¶ 147. First, Flowers asserts that bias is evident from the Court's holding in *Flowers III*. Flowers's claim comes from the Court's statement in *Flowers III* that the case presented "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935 (¶ 66). The problems surrounding jury selection in *Flowers III* are not present in today's case. In that case, the State exercised all twelve of its peremptory strikes on African Americans and its three peremptory *1137 strikes for alternate jurors on African Americans. *Id.* at 917–18. The Court found that the following facts resulted in a *Batson* violation: the State exercised peremptory strikes against African–American veniremen who shared characteristics with tendered white jurors; the State's proffered race neutral reasons for striking African Americans were not supported by the record; and the State failed to voir dire other

jurors as to a characteristic cited as a race neutral basis. *Id.* at 935–39. However, the facts were particular to the third trial, and *Flowers III* does not stand for the proposition that the community as a whole—and any future venire—would be biased. The claim is without merit.

[58]¶ 148. Second, Flowers claims that racial tension was escalated by the arrests of two African–American jurors for perjury during Flowers's fourth trial. During that trial, Mary Annette Purnell, an African American who was selected to serve as alternate juror, said during voir dire that she did not know Flowers or his family, but after the jury was selected, another juror reported to the prosecution that Purnell knew Flowers and his family. Purnell admitted to meeting with Flowers prior to the trial but after the jury summons. Apparently, during jury selection, Flowers gave his attorney a note that said they needed to "fight for" Purnell to be on the jury. Flowers's counsel denied having read the note prior to the perjury accusations. Purnell pleaded guilty to perjury and received two ten-year sentences.

¶ 149. At the end of the fourth trial, after the jury was unable to reach a unanimous decision, jurors reported to the trial court that James Bibbs, an African–American juror, had told other jurors that the police did not adequately investigate the murders and that evidence had been planted. After the jury was released, the trial court questioned Bibbs about the reports. Bibbs denied making the exact statements, but he admitted that he had told other jurors that he had been in an alley close to Tardy Furniture on the day of the murders and that investigators did not inspect that area. Bibbs claimed that he did not report the information during voir dire because he misunderstood questions relating to whether he had knowledge of the crimes. Although the reason is unclear from the record, the perjury charges against Bibbs eventually were *nolle prossed*.

¶ 150. Flowers claims that Bibbs was possibly the only juror at the fourth trial who did not vote to convict Flowers. He further contends that the perjury arrests "escalated" racial tension and that the arrests were reported in the press and "pervaded the jury venire" in today's case. To support his contentions, Flowers cites local media articles discussing the perjury arrests. Nothing in the record, however, discusses whether members of the venire in today's case were aware of the arrests. Further, nothing in the record suggests that the arrests were anything less than legitimate. Clearly, Purnell admitted to perjury, and Bibbs admitted to having knowledge that he did not disclose during voir dire. The contention is not supported by the record and is without merit.

¶ 151. Next, Flowers's claim that excessive law enforcement presence caused bias in the venire also is without merit. When Flowers's counsel raised concerns that venire members were standing close to a law enforcement officer during voir dire, the trial court responded by reminding counsel that the potential jurors could be questioned about any contact with law enforcement during voir dire. Considering the notoriety of the crimes in the case, a large number of law enforcement personnel would be expected.

*1138 ¶ 152. Further, Flowers's claim that the jury interrupted a mitigation witness is not supported by the record. During the mitigation phase, pizza was ordered for the jury. Apparently, the pizza arrived while Archie Flowers Sr., Flowers's father, was providing mitigation testimony. In response to the food arriving, Flowers's counsel stated: "Your honor, if the jurors' food is here, I don't want to stand in the way of that." There is no indication that the jury interrupted the witness, and Flowers's counsel encouraged the recess.

¶ 153. Flowers asserts that a majority of the jurors empaneled were acquainted with Flowers, acquainted with the victims, or had formed opinions related to the case prior to trial. Flowers claims that the venire was skewed in favor of the prosecution because a higher percentage of potential jurors who were familiar with Flowers and his family were struck from the venire compared to venire members who were familiar with the victims and their families. He claims that, because potential jurors who were familiar with the Flowers family were more likely to state that their relationships with the family would affect their ability to serve as fair and impartial jurors, ultimately, a higher percentage of jurors

who were familiar with the victims and their families was empaneled.

[59]¶ 154. Jurors who state that their relationship with a defendant or a victim would affect their ability to be impartial properly are struck for cause. *See* *Manning*, 735 So.2d at 340 (¶ 31) ("doubts as to one's ability to follow the law and vote for the death penalty when appropriate is a sufficient race-neutral reason"); *Stevens*, 806 So.2d at 1062 (¶ 138) (removal of juror is justified where the trial court is "is left with the impression that a prospective juror would be unable to faithfully and impartially apply the law") (quoting *Wainwright v. Witt*, 469 U.S. 416, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); *Davis v. State*, 660 So.2d 1228, 1244 (Miss. 1995) (same). However, when jurors indicate that they can be impartial, they do not have to be struck based on relationships alone. "The linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen." *Hughes v. State*, 983 So.2d 270, 284 (¶ 63) (Miss. 2008) (quoting *Howell*, 860 So.2d at 720 (¶ 37)). Thus, if jurors indicated that they could not be fair and impartial, they properly were struck. The claim is without merit.

[60]¶ 155. Flowers's claim that the trial court erred by denying several of his challenges for cause fails. The potential jurors that Flowers challenged for cause were not selected to serve as jurors, and Flowers did not exercise all of his peremptory challenges. "Denial of challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. This threshold test is applicable in a capital murder case." *Berry v. State*, 575 So.2d 1, 9 (Miss. 1990) (citing *Billiot v. State*, 454 So.2d 445, 457 (Miss. 1984); *Rush v. State*, 278 So.2d 456, 458 (Miss. 1973)).

[61]¶ 156. Lastly, Flowers suggests that the trial court should have quashed the entire venire or provided for a "cooling-off period" until a fair and impartial jury could be empaneled, and he claims that the trial court's failure to do so was error. Flowers's suggested remedies are not viable. Flowers's claim that a pervasive bias existed throughout the community conflicts with his suggestion that another venire should have been empaneled. If the bias was in fact pervasive, another venire from the same community likely would contain the same bias. Flowers's suggested "cooling-off period" is even more troublesome, as Flowers himself would be left in *1139 limbo awaiting another trial. In *Hughes v. State*, we held that the trial court did not err in denying the defendant's motion to quash the venire based on the crime being well known within the community. *Hughes*, 983 So.2d at 284 (¶ 64). Because the jurors indicated that their knowledge of the case would not affect their ability to be fair and impartial, the trial court did not abuse its discretion in denying the motion to quash. *Id.* Again, "[t]he linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen." *Id.* at 284 (¶ 63) (quoting *Howell*, 860 So.2d at 720 (¶ 37)).

[62]¶ 157. A more appropriate remedy would be to expand the size of the venire. *See* *Toyota Motor Corp. v. McLaurin*, 642 So.2d 351, 358 (Miss. 1994); *Mhoon v. State*, 464 So.2d 77, 82 (Miss. 1985), *superseded by statute on other grounds*. However, the size of the venire was appropriately large, as 600 people were called for voir dire. Thus, it would seem that the trial court called a large enough venire to avoid problems. Trial courts have broad discretion in conducting voir dire. *See* *Howell*, 860 So.2d at 726 (¶ 67). "A jury selection procedure which gives the defendant 'a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror' is proper." *Id.* at 726–27 (¶ 69) (quoting *McLemore v. State*, 669 So.2d 19, 25 (Miss. 1996)). We cannot say that the trial court abused its discretion in conducting voir dire. For the foregoing reasons, Flowers's claims that he was denied the right to a fair trial because the jury was biased are without merit.

VIII. Whether the trial court erred in refusing Flowers's requested culpability-phase instructions.

[63] [64] [65]¶ 158. Flowers claims that the trial court erred in refusing three of his culpability-phase instructions—D–7, D–8, and D–9. "Jury instructions are within the sound discretion of the trial court." *Gillett*, 56 So.3d at 496 (¶ 67) (quoting *Rubenstein*, 941 So.2d at 787 (¶ 239)).

This Court does not single out any instruction or take instructions out of context; rather, the instructions are to

be read together as a whole. *Thomas v. State*, 818 So.2d 335, 349 (Miss. 2002). A defendant is entitled to have jury instructions which present his theory of the case. *Id.* This entitlement is limited, however, in that the court is allowed to refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Id.*

*Gillett*, 56 So.3d at 496 (¶ 67) (quoting *Walker v. State*, 913 So.2d 198, 234 (¶ 132) (Miss. 2005)).

[66]¶ 159. Flowers claims that the trial court erred in refusing instruction D–6 because he was entitled to an instruction on the burden of proof. That instruction read as follows:

> Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

The trial court refused the instruction, finding that it was repetitive of instruction S–1, which stated that the State must prove all of the elements of the crimes beyond a reasonable doubt. Because the instructions are repetitive, the trial court did not err in denying D–6. *See Montana v. State*, 822 So.2d 954, 961 (¶ 26) (Miss. 2002) ("A trial judge is under no obligation •1140 to grant redundant instructions."). The issue is without merit.

[67]¶ 160. Instructions D–7 and D–8 were circumstantial-evidence instructions. They provided:

D–7: The Court instructs the jury that [if] the prosecution has used circumstantial evidence to show that Curtis Flowers committed the charged crimes, then the evidence must be so strong as to rule out any other reasonable explanation except that of guilt. Circumstantial evidence is anything other than direct evidence, such as, to give one example, testimony of someone who witnessed an event. In other words, you may not return a verdict of guilty if you could reasonably interpret the facts in a way that would show Mr. Flowers to be not guilty.

D–8: The Court instructs the jury that if there is any fact or circumstance in this case susceptible of two interpretations, one favorable and the other unfavorable to Curtis Flowers, and when the jury has considered such fact or circumstance with all the other evidence, if there is a doubt as to the correct interpretation, then you must resolve such doubt in favor of Curtis Flowers and interpret that fact or circumstance in favor of Mr. Flowers.

In support of his argument that the trial court erred in refusing the instructions, Flowers attacks the credibility of Odell Hallmon, the jailhouse informant. Flowers recognizes that Mississippi caselaw allows trial courts to refuse circumstantial-evidence instructions in cases in which direct evidence of the crime is presented, which includes testimony from a jailhouse informant. *See Ladner*, 584 So.2d at 750 (case is not circumstantial even if the only direct evidence is a "jailhouse confession").

¶ 161. Flowers, however, relies on the Court's opinion in *McNeal v. State*, 551 So.2d 151 (Miss. 1989), for the proposition that jailhouse informant testimony should not serve as a basis for refusing a circumstantial-evidence instruction when the informant's credibility is questionable. In *McNeal*, the jailhouse informant testified in exchange for a reduced sentence. *Id.* at 158. The Court questioned the refusal of the instruction in *McNeal*, but the case was reversed and remanded on other grounds, so the Court did not go so far as to find that a circumstantial-evidence instruction should have been given. *Id.* at 158–59 ("It is doubtful that such testimony should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction; however, we do not decide that

question here, nor is it necessary, because we find merit and reverse under [another] assignment of error.").

¶ 162. The Court has clarified the jailhouse informant/circumstantial evidence issue in subsequent cases. In *Ladner*, the Court held that it was not error to refuse such an instruction in the case of a jailhouse informant:

> A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. The "confession" which constitutes direct evidence of a crime is not limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. In *Holliday v. State*, 455 So.2d 750, 752–53 (Miss. 1984), a witness testified that he had overheard the defendant say to another person that he had killed his wife. This Court held that the circumstantial evidence instruction was not required. *See Foster v. State*, 508 So.2d 1111, 1115 (Miss. 1987) (Court held that without "jailhouse confession" the case would have been entirely circumstantial).

*1141 *Ladner*, 584 So.2d at 750 (other citations omitted). The Court then stated that, because *McNeal* was decided on other grounds, it did not support the defendant's proposition that a circumstantial-evidence instruction should have been given. *Id.* at 750 n.1. We reaffirmed the *Ladner* holding in *Moore v. State*:

> As [the defendant] points out, prior to *Ladner*, this Court expressed doubt as to whether a jailhouse informant's testimony "should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction." *McNeal*, 551 So.2d at 159. While *McNeal* declined to answer that question, *Ladner* settled the matter, holding that when the type of testimony given by [the informant] in the case sub judice is present, circumstantial evidence instructions are not necessary.

*Moore*, 787 So.2d at 1288 (¶ 18). Following the Court's holdings in *Ladner* and *Moore*, the trial court in today's case found that Hallmon's testimony provided direct evidence of the crimes and denied instruction D–7 and D–8. We recognize that Hallmon's credibility is questionable. However, Hallmon was cross-examined extensively at trial, and the trial court instructed the jury "that the law looks with suspicion and distrust on the testimony of a jailhouse informant, and requires the jury to weigh the same with great care and suspicion." The jury was instructed adequately regarding Hallmon's testimony, and the trial court did not err by refusing the circumstantial-evidence instructions under *Moore* and *Ladner*. The issue is without merit.

IX. Whether the trial court erred in refusing Flowers's penalty-phase instructions and in granting the State's aggravating-circumstances instruction.

¶ 163. Flowers claims the trial court erred in denying several of his penalty phase jury instructions—D–4, D–12, D–33, D–34, D–38, and D–39. He also asserts that the trial court erred by allowing the State's aggravating-circumstances instruction. Again, jury instructions are within the sound discretion of the trial court, and the trial court properly refuses instructions that are incorrect statements of the law, are covered fairly in other instructions, or do not have a foundation in the evidence. *Gillett*, 56 So.3d at 496 (¶ 67).

A. Instruction D–4

[68]¶ 164. Flowers contends that the trial court erred in refusing instruction D–4, which was a "presumption of life" instruction. The proffered instruction read:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in this case would be life imprisonment. These presumptions remain with Mr. Flowers throughout the sentencing hearing and can only be overcome if the prosecution convinces each one of you, beyond a reasonable doubt, that the death penalty is the only appropriate punishment.

The Court consistently has refused to find error when a trial court denies presumption-of-life instructions. *See Gillett*, 56 So.3d at 514 (¶ 135); *Brown v. State*, 890 So.2d 901, 920 (¶ 72) (Miss. 2004) ("We have repeatedly said that we reject the 'proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment.' ") (quoting *Watts v. State*, 733 So.2d 214, 241 (¶ 81) (Miss. 1999)). As such, the trial court did not err in refusing the presumption-of-life instruction.

B. Instructions D–12 and D–33

[69]¶ 165. Flowers claims that the trial court erred by refusing to grant two *1142 instructions related to aggravating circumstances and circumstantial evidence. The instructions provided:

D–12: The Court instructs the jury that if the State has relied on circumstantial evidence to establish an aggravating circumstance, then the evidence for the State must be so strong as to establish the aggravating circumstance not only beyond a reasonable doubt, but must exclude every other reasonable hypothesis other than establishment of the aggravating circumstance.

D–33: During the penalty phase, I instruct you that if there is a fact or circumstance in this case which is susceptible of two interpretations, one favorable and the other unfavorable to Mr. Flowers and if, after considering all the other facts and circumstances, there is a reasonable doubt regarding the correct interpretation, then you must resolve such doubt in favor of Mr. Flowers and place upon such fact or circumstance the interpretation most favorable to Mr. Flowers.

Flowers claims that whether a criminal defendant is entitled to a circumstantial-evidence instruction during the penalty phase is a matter of first impression. Flowers is incorrect. We have held that a trial court did not abuse its discretion in refusing to grant circumstantial-evidence instructions at the penalty phase. *Fulgham*, 46 So.3d at 340 (¶ 80); *King v. State*, 960 So.2d 413, 446–47 (¶ 70) (Miss. 2007). In support of its finding, the *King* Court wrote that the jury's finding that the defendant actually committed the murder during the guilt-or-innocence phase "indicate[d] its rejection of any other reasonable hypothesis of [the defendant's] participation in the crime." *King*, 960 So.2d at 446 (¶ 70). Instructions D–12 and D–33 are almost identical to the instruction at issue in *Fulgham*. The trial court did not err in refusing the instructions.

C. Instruction D–34

[70]¶ 166. Instruction D–34 provided: "The Court instructs the jury that if you cannot, within a reasonable time, agree as to punishment, the court will dismiss you and impose a sentence of imprisonment for life without the benefit of parole." Flowers claims that the trial court should have granted the instruction because the jury did not receive guidance on what would happen if the jurors could not agree unanimously on a punishment. Flowers contends that the alleged error is evident by a note sent from the jury during the penalty phase. The note stated: "If we cannot agree unanimously, who will make the ultimate decision?" The trial court responded to the note by stating: "That is not an issue the jury should be concerned about."

¶ 167. The Court has reviewed almost identical instructions in previous cases and found that the trial court did not err in refusing the proffered instructions. In *Gillett*, we held that the trial court did not err in refusing an instruction that stated: "If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of life without the benefit of parole. If you cannot agree, know that any of you may inform the bailiff of this." *Gillett*, 56 So.3d at 515 (¶ 138). Because the jury was instructed on the three possible penalty phase outcomes—death, life imprisonment without parole, or inability to agree unanimously on a punishment—the Court held that the jury was properly instructed on the possibility of not reaching a unanimous decision. *Id.* at 516 (¶ 139). In another capital murder case, the Court held that the trial court did not err in refusing the following instruction: "The court instructs the jury that if you do not agree upon punishment the court will sentence the defendant to *1143 life imprisonment without

possibility of parole or early release." *Edwards v. State*, 737 So.2d 275, 316 (¶ 142) (Miss. 1999). The *Edwards* Court held that the jury was adequately instructed that it could "return to the courtroom and report that it was unable to agree unanimously on punishment." *Id.* at 316 (¶ 143).

¶ 168. Similar to *Gillett* and *Edwards*, the trial court in today's case instructed the jury that it could reach three possible outcomes in the penalty phase: death, life without parole, or being unable to agree unanimously on a punishment. Accordingly, the trial court did not err in refusing instruction D–34.

D. Instructions D–38 and D–39

[71]¶ 169. Flowers claims that the trial court erred by refusing instructions on the jury's ability to consider mercy. Proposed instruction D–38 read:

A mitigating factor is anything that in fairness and mercy may reduce blame or that may justify a sentence less than death. Even if a factor does not justify or excuse the crime it may still be a mitigating factor. It is for each of you to decide if a factor is mitigating.

Mercy alone can be a mitigating factor you can consider in deciding not to impose the death penalty and to impose a sentence of life without parole.

Instruction D–38 is clearly a mercy instruction, and the Court has recognized that such instructions are not required and "may be given at the discretion of the trial court." *Foster*, 639 So.2d at 1300. Flowers's counsel recognized during the sentencing instruction hearing that D–38 was a mercy instruction. The trial court did not err in refusing the instruction.

¶ 170. Instruction D–39 provided: "The death penalty is never required. You may always find that Mr. Flowers should be sentenced to life in prison or life in prison without the possibility of parole." Although Flowers describes D–39 as a "mercy instruction," upon close examination, the instruction simply seems to instruct the jury on its ability to impose a sentence of life in prison rather than the death penalty. At the sentencing instruction hearing, the trial court refused the instruction because it was repetitive of the omnibus sentencing instruction given by the trial court. As part of the omnibus instruction, the jury was instructed: "In the event that you find that the mitigating circumstance(s) do not outweigh or overcome the aggravating circumstance(s), you *may* impose the death sentence." (Emphasis added.) Thus, the jury was given the option to sentence Flowers to life without parole or to impose the death penalty if it found that the aggravating circumstances outweighed the mitigating circumstances. Although the life without parole option was stated more clearly in D–39 than in the omnibus instruction, it cannot be said that the jury was not given the instruction. The trial court did not err in refusing instruction D–39.

E. Aggravating Circumstances

¶ 171. The court instructed the jury on three aggravating circumstances: (1) "the Defendant knowingly created a great risk of death to many persons"; (2) "the capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain"; and (3) "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." *See* Miss. Code Ann. § 99–19–101(5) (Rev. 2015). Flowers claims that the trial court erred in issuing the instruction.

1. Great Risk of Death to Many Persons

[72]¶ 172. Flowers asserts that the trial court erred by allowing the jury to *1144 consider the aggravating factor of

"great risk of death to many persons." The Court has held that the "great risk" aggravator is appropriate when there are multiple victims of a single crime. *See Flowers II*, 842 So.2d at 560 (¶ 91) (quoting *Flowers I*, 773 So.2d at 325 (¶ 53) (citing *McGilberry v. State*, 741 So.2d 894, 925 (¶¶ 130–36) (Miss. 1999))). *See also Jackson v. State*, 672 So.2d 468, 490 (Miss. 1996) (when "multiple victims have been stabbed in the same or a nearby room, courts in other jurisdictions generally have found that there was sufficient evidence to warrant the 'great risk to many persons' aggravating circumstance") (collecting cases). Flowers acknowledges the Court's prior holdings, but he asks the Court to rule differently here.

[73]¶ 173. To give the instruction, the defendant must have created a great risk of death to someone other than his intended victim. *Porter v. State*, 732 So.2d 899, 906 (¶ 31) (Miss. 1999). In *Porter*, the Court held that the evidence did not support the "great risk" aggravator because the defendant had killed only one person, whom he had been hired to kill, and he fled the scene after shooting that person, even though other people were inside the house at the time. *Id.* In *Corrothers v. State*, the Court held that the "great risk" aggravator was proper because the "evidence showed that Corrothers entered the home intending to attack Taylor, and in doing so, he shot Frank and Tonya and held a gun on Josh." *Corrothers*, 148 So.3d at 320 (¶ 118).

¶ 174. Flowers asserts that the evidence does not indicate that the person who killed the four victims had any intention to harm anyone other than the victims he was robbing. The State's theory was that Flowers intended to kill Bertha Tardy because she fired him and withheld his pay and, in the process of doing so, he shot and killed the others. Flowers knew Carmen Rigby from working at the store, but there is no evidence that he knew Robert Johnson or Derrick Stewart, as the day of the murders was their first day to work at the store. Based on the State's theory of the case, which was presented to the jury, we hold that there was sufficient evidence on which the jury could have found that Flowers caused a great risk of death to people other than his intended victim, Bertha Tardy. Further, because Flowers shot four victims in the same room, the evidence was sufficient to warrant the instruction. *Jackson*, 672 So.2d at 490

¶ 175. Flowers also claims that "to allow the same conduct that is an essential element of the underlying crime to also aggravate that crime for sentencing purposes" violates the Eighth Amendment. Flowers does not cite any authority for this proposition, nor does he explain how the aggravator violates the Eighth Amendment. The State understands Flowers's argument to be that use of the aggravator violates double jeopardy. We have held specifically that the "great risk" aggravator does not violate double jeopardy. *See Corrothers*, 148 So.3d at 320 (¶¶ 117–19) (quoting *Flowers II*, 842 So.2d at 561–62 (¶ 94) (quoting *Wilcher v. State*, 697 So.2d 1087, 1105 (Miss. 1997))). The Court also has held that "doubling"—the use of an element of the underlying crime as an aggravating circumstance—does not violate the Constitution. *See Corrothers*, 148 So.3d at 320 (¶ 116); *Gillett*, 56 So.3d at 510 (¶ 118); *Ross I*, 954 So.2d at 1014 (¶ 120). Accordingly, the issue is without merit.

2. Armed Robbery for Pecuniary Gain

[74]¶ 176. Flowers claims that the trial court erred by instructing the jury to consider the aggravating factor of armed robbery for pecuniary gain because the instruction essentially combined two aggravating factors. The instruction given to *1145 the jury stated, in part: "Consider only the following elements of aggravation in determining whether the death penalty should be imposed: ... The capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain." Mississippi Code Section 99–19–101(5) lists ten aggravating factors the jury may consider during the penalty phase of capital punishment cases. One factor listed is the capital offense occurring while in the commission of any robbery. Miss. Code Ann. § 99–19–101(5)(d) (Rev. 2015). A separate factor is commission of the capital offense for pecuniary gain. Miss. Code Ann. § 99–19–101(5)(f) (Rev. 2015).

¶ 177. Flowers recognizes that the Court previously has found similar aggravating-circumstances instructions

permissible, but he encourages the Court to reconsider its reasoning. In *Howell v. State*, the Court held that it was not error for the following aggravating-circumstance instruction to be given to the jury: "The capital offense was committed for pecuniary gain during the course of an armed robbery." *Howell*, 860 So.2d at 756 (¶ 186). The Court noted that the jury is not permitted to "doubly weigh" aggravating circumstances; thus, listing armed robbery and pecuniary gain as *separate* aggravating circumstances could be unconstitutional in some factual circumstances. *Id.* at 756 (¶ 188) (quoting *Turner v. State*, 732 So.2d 937, 954–55 (¶¶ 71–72) (Miss. 1999)). When pecuniary gain and armed robbery are used within the *same* factor, however, the concern of the jury "doubly weighing" the aggravating factors is not present. As such, the issue is without merit.

3. Avoiding Lawful Arrest or Effecting an Escape from Custody

[75]¶ 178. Flowers claims that the trial court erred by instructing the jury that it could consider that the capital offense occurred for the purpose of avoiding or preventing arrest as an aggravating factor, because the evidence presented at trial was insufficient to support the instruction. Flowers also claims that the definition of avoiding arrest is unconstitutional because it is overly broad. Whether the avoiding arrest aggravator is constitutional has been addressed several times, and we consistently have held that it is not overly broad. *Brawner v. State*, 947 So.2d 254, 266 (¶ 36) (Miss. 2006) (collecting cases).

¶ 179. The factor is appropriate where "the accused purposefully killed the victim of the underlying felony to avoid or prevent arrest for that felony." *Id.* at 266 (¶ 37). Further,

> [i]f there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.

*Id.* (quoting *Wiley v. State*, 750 So.2d 1193, 1206 (¶ 46) (Miss. 1999)). In *Wiley*, the defendant shot and killed a witness to a robbery and injured another witness. *Wiley*, 750 So.2d at 1206 (¶ 47). The Court found that, because the defendant knew the victims and attempted to dispose of evidence linking him to the robbery, there was sufficient evidence to support the aggravating factor. *Id.* at 1206 (¶ 48). Like the defendant in *Wiley*, Flowers knew the murder victims. Further, the murder weapon was never found, nor were the Fila Grant Hill tennis shoes. However, a Fila Grant Hill shoebox was found at Flowers's girlfriend's house, and Flowers had been seen wearing Fila Grant Hill shoes. Cash was found hidden in Flowers's headboard, and Flowers gave conflicting statements to "1146 police regarding his whereabouts on the morning of the murders. In *Wiley*, the Court held that the defendant's "efforts to dispose of and/or conceal the evidence of his crime [were] sufficient to support the avoiding arrest instruction." *Id.* at 1206 (¶ 48). In the instant case, it could be "reasonably inferred" that Flowers attempted to conceal his identity, disposed of evidence, or tried to "cover his tracks." The evidence is sufficient to support the avoiding-arrest instruction.

X. Whether Flowers's multiple trials violated the Double Jeopardy Clause and the Due Process Clause of the Fourteenth Amendment.

¶ 180. Flowers claims that his six trials for the Tardy Furniture murders violate his due process rights and the Double Jeopardy Clause. Flowers's first and second trials resulted in convictions and death sentences that subsequently were overturned by the Court for various instances of prosecutorial misconduct. *Flowers I*, 773 So.2d 309; *Flowers II*, 842 So.2d 531. At his third trial, Flowers again was convicted and sentenced to death, but the Court reversed and remanded for a new trial for a *Batson* violation. *Flowers III*, 947 So.2d 910. At Flowers's fourth and fifth trials, the juries was unable to reach unanimous decisions, and the trials resulted in mistrials. Prior to today's case, Flowers moved to have the case dismissed as a violation of his due process rights and the Double Jeopardy Clause; the trial court denied the motion. Claims of double jeopardy are reviewed de novo. *Rowland v. State*, 98 So.3d 1032, 1037 (¶ 9) (Miss. 2012) (quoting *Foreman v. State*, 51 So.3d 957, 960 (¶ 8) (Miss. 2011)).

[76] [77] [78]¶ 181. The Double Jeopardy Clause of the Mississippi Constitution reads: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." Miss. Const. art. 3, § 22. Likewise, the Fifth Amendment to the United States Constitution provides that never "shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause does not bar reprosecution when a conviction has been set aside on appeal. *Green v. United States*, 355 U.S. 184, 189, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Also, jeopardy does not attach when a criminal case ends by the jury failing to reach a unanimous verdict. *Id.* at 188, 78 S.Ct. 221. *See also Richardson v. United States*, 468 U.S. 317, 323–24, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Keerl v. Montana*, 213 U.S. 135, 137–38, 29 S.Ct. 469, 53 L.Ed. 734 (1909). "Double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense." *Powell v. State*, 806 So.2d 1069, 1074 (¶ 8) (Miss. 2001) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). Flowers has not been acquitted, his convictions have not been upheld on appeal, and he has not received multiple punishments. Therefore, the Double Jeopardy Clause has not been implicated.

[79]¶ 182. Flowers also claims that continued trials, despite the reversals in his first three direct appeals on the bases of prosecutorial misconduct, violate his due process rights. We have not addressed whether multiple trials result in a due process violation, but other courts have held that multiple retrials do not violate a defendant's due process rights when implications of double jeopardy are not at issue. *See* *1147 *People v. Sierb*, 456 Mich. 519, 581 N.W.2d 219, 223–25 (1998); *United States v. Jones*, 122 F.3d 1058 (2d Cir. 1997). *See also United States v. Faulkenberry*, 461 Fed.Appx. 496, 503 (6th Cir. 2012); *United States v. Andrews*, 2 F.Supp.3d 847, 853 (N.D. W. Va. 2014); *Wallin v. Sinclair*, 2013 WL 2338259 (W.D. Wash. 2013); *Whiteside v. Warden, S. Ohio Corr. Facility*, 2011 WL 5551598 (S.D. Ohio 2011). Further, the United States Supreme Court has held that the Due Process Clause does not provide greater protection against double jeopardy than the Double Jeopardy Clause itself. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). The Court wrote:

At bottom, petitioner's due-process claim is nothing more than his double-jeopardy claim in different clothing. As we have said: "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). We decline petitioner's invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.

*Id.* *See also United States v. Neto*, 659 F.3d 194, 201 (1st Cir. 2011) (the Due Process Clause of the Fifth Amendment does not supplement the protections provided by the Double Jeopardy Clause). Flowers's due process claim is an attempt to supplement the protections of the Double Jeopardy Clause. Because the double jeopardy protections have not been violated, Flowers cannot assert a due process claim on the same grounds. The issue is without merit.

XI. Whether the convictions and death sentences were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their counterparts in the Mississippi Constitution.

¶ 183. Flowers presents several contentions of error related to his indictments, the admissibility of victim-impact testimony, and the constitutionality of the death penalty. Flowers claims that the trial court should have precluded the State from seeking the death penalty because of the alleged lack of evidence. Because there was sufficient evidence to support a conviction, the issue is without merit. *See* Issue IV *supra*. Flowers also asserts that his right to a speedy trial was violated for the Carmen Rigby and Robert Golden convictions, but he provides no support for that contention. As such, the issue is without merit. *See Byrom v. State*, 863 So.2d 836, 853 (¶ 35) (Miss. 2003) ("failure to cite relevant authority obviates the appellate court's obligation to review such issues").

**A. Whether it was constitutional to try Flowers for all four murders in the same trial despite there being four, single-count indictments.**

**[80]¶ 184. Flowers claims that it was error for him to be tried for all four murders *1148 at a single trial when there were four, single-count indictments rather than a multicount indictment. He further claims that the trial court erred in not entering an order consolidating the four cases or obtaining a statement waiving the multicount indictment. Flowers concedes that he did not object at trial to proceeding under the four, single-count indictments, but he claims that the issue is one of plain error.**

**¶ 185. At his first trial, Flowers filed a motion to consolidate the four murder indictments into one trial, but the trial court denied the motion. *Flowers I*, 773 So.2d at 318 (¶ 26). During Flowers's third trial, the trial court announced that the parties had agreed to consolidate the four cases. *See Flowers III*, 947 So.2d at 916 (¶ 5). Flowers's fourth, fifth, and sixth trials were for all four murders.**

**¶ 186. In his brief, Flowers claims that Mississippi Code Section 99–7–2 requires that he should have been charged under a multicount indictment and/or that the trial court should have entered an order consolidating the matters. Section 99–7–2 does not include either of the alleged requirements; rather, it includes permissive language allowing—but not requiring—the trial court to proceed under a multicount indictment. Section 99–7–2 reads in its entirely:**

**(1) Two (2) or more offenses which are triable in the same court *may* be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.**

**(2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges *may* be tried in a single proceeding.**

**(3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.**

**(4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.**

**(5) Nothing contained in this section shall be construed to prohibit the court from exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.**

Miss. Code Ann. § 99–7–2 (Rev. 2014) (emphasis added). In 2002, the Court of Appeals addressed whether a defendant is entitled to a multicount indictment. *Brooks v. State*, 832 So.2d 607, 610–11 (Miss. Ct. App. 2002). In *Brooks*, the defendant was charged with two counts of sale of cocaine in separate indictments and claimed on appeal that he should have been charged under a multicount indictment. *Id.* at 608, 610 (¶¶ 1, 13). The court held that single-count indictments were permissible:

[The defendant] argues the cocaine sales were part of a common scheme; therefore, he should have been charged in a multi-count indictment. [The defendant] is incorrect. Separate indictments are the usual practice in Mississippi, while multi-count indictments are exceptional. Mississippi Code Annotated § 99–7–2–(1) (Rev. 2000) provides the three exceptional situations in which a multi-count indictment *may* be brought: "(1) the offenses are based on the same act

or transaction; or (2) the offenses are *1149 based on two (2) or more acts or transactions connected together; or (3) the offenses are based on two (2) or more acts or transactions constituting parts of a common scheme or plan." *Id.* A basic tenet of statutory construction is that the word "shall" is a mandatory directive, and the word "may" is discretionary in nature. *American Sand and Gravel Co. v. Tatum*, 620 So.2d 557, 563 (Miss. 1993); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1027 (Miss. 1990). In this case, the State could have brought a multi-count indictment but was not required to do so.

*Id.* at 610 (¶ 13). Flowers provides no other authority for his proposition that a multi-count indictment was required.

¶ 187. Flowers also claims that the trial court erred by not entering an order consolidating the matters and/or obtaining a waiver from Flowers "to be tried on only a single count indictment." In support of his argument, Flowers cites *State v. Berryhill*, 703 So.2d 250 (Miss. 1997), and *Woods v. State*, 200 Miss. 527, 27 So.2d 895, 896–97 (1946). Neither case supports Flowers's contention. *Berryhill* stands for the proposition that "capital murder indictments that are predicated upon the underlying felony of burglary must assert with specificity the felony that comprises the burglary." *Berryhill*, 703 So.2d at 258. And, although the Court in *Woods* found that the trial court erred by allowing the State to consolidate for trial three separate crimes—exhibiting a deadly weapon, carrying a concealed weapon, and assault and battery with fists—the case is distinguishable from Flowers's case. *Woods*, 27 So.2d at 897. In *Woods*, the Court noted that the three crimes contained different elements and the different elements led to a possibility of prejudice for the defense:

> the accused had to be prepared to meet evidence of three distinct crimes, where much of the evidence as to one was not competent as to the others. Certainly the accused was confounded in his defense and evidence was introduced before the jury which would not have been competent upon separate trials.

*Id.* The concern present in *Woods*—that the defendant would have to defend three distinct crimes—is not present in today's case. Flowers was charged with four counts of capital murder with the underlying felony of armed robbery. Because proceeding under single-count indictments is permitted, the issue is without merit.

B. Whether the trial court erred by refusing Flowers's motion to quash the indictment for failure to allege an aggravating circumstance and/or the *mens rea* requirement.

[81] [82]¶ 188. Flowers claims that his indictments were constitutionally insufficient because they failed to list the aggravating factors and/or the *mens rea* requirement. As mentioned above, Flowers was charged with the murders in four single-count indictments. Aside from the victims' names, each indictment contained identical language. The indictments read, in part:

> CURTIS GIOVANNI FLOWERS late of Montgomery County, Mississippi, on or about the 16th day of July, 1996, in the county and state aforesaid, and within the jurisdiction of this Court, alone or while acting in concert with another or others, did unlawfully, wilfully, feloniously, and either with or without the deliberate design to effect death, kill and murder [the victim], a human being, by shooting her with a pistol, while engaged in the commission of the felony crime of armed robbery in violation of Miss. Code Ann. Section 97–3–79 and Section 97–3–19(2)(c) [as amended] against the peace and dignity of the State of Mississippi.

*1150 ¶ 189. Flowers claims that the indictments were insufficient under the United States Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 605–06, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We addressed the same argument in *Pitchford* and said that we have held repeatedly that "these cases have no application to Mississippi's capital murder sentencing scheme." *Pitchford*, 45 So.3d at 258 (¶ 184). The indictment in *Pitchford* was almost identical to Flowers's indictments. *See id.* at 257–58 (¶ 183). The *Pitchford* Court provided the following regarding the Court's refusal to apply *Apprendi* and *Ring*

to the issue:

This Court repeatedly has rejected this type of argument. We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. The purpose of an indictment is to furnish the defendant with notice and a reasonable description of the charges against him so that he may prepare his defense. An indictment is required only to have a clear and concise statement of the elements of the crime with which the defendant is charged.

Under Mississippi law, the underlying felony that elevates the crime to capital murder must be identified in the indictment along with the section and subsection of the statute under which the defendant is being charged. In addition, our death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment.

When [the defendant] was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required.

*Pitchford*, 45 So.3d at 258 (¶ 184) (quoting *Goff v. State*, 14 So.3d 625, 665 (¶¶ 174–77) (Miss. 2009) (citations omitted)). Because Flowers's indictments provided him with "notice and a reasonable description of the charges against him so that he may prepare his defense," the issue is without merit.

C. Whether the trial court erred by not declaring Mississippi Code Section 97–3–19(2)(e) unconstitutional and/or by not precluding the prosecution from relying on Mississippi Code Section 99–19–101(5)(d) as an aggravating circumstance.

¶ 190. Flowers claims that Mississippi Code Section 97–3–19(2)(e) is unconstitutional because it allows for an "arbitrary and capricious" application of the death penalty, since cases of deliberate design and depraved heart murder are not death penalty eligible when felony murder is death penalty eligible. He further contends that the application of Mississippi Code Section 99–19–101(5)(d) as an aggravating factor is unconstitutional because the underlying felony—armed robbery—made the case eligible for the death penalty. Therefore, Flowers claims that the underlying felony cannot also be used as an aggravating circumstance. We have discussed both of the issues in past opinions.

¶ 191. In *Batiste*, the defendant claimed that Mississippi's death-penalty scheme was unconstitutional "because it [did] not allow the death penalty in cases of simple murder, no matter how premeditated or atrocious." *Batiste*, 121 So.3d at 872 (¶ 181). We held that Batiste was not entitled to relief because "the death penalty in Mississippi does not violate the U.S. Constitution." *Id.* (quoting *Gillett*, 56 So.3d at 525 (¶ 168)). We also have addressed *1151 whether the underlying felony may be considered an aggravating circumstance, and we have held that use of the underlying felony as the aggravating circumstance is appropriate. *See Manning*, 735 So.2d at 350–51 (¶ 67). Further, the use of an underlying felony as an aggravating circumstance has been upheld by the United States Supreme Court. *See Lowenfield v. Phelps*, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). For the above reasons, the issue is without merit.

D. Whether the trial court erred in permitting victim-impact testimony.

[83]¶ 192. During the penalty phase, four witnesses provided victim-impact testimony—Roxanne Ballard, Bertha Tardy's daughter; Brian Rigby, Carmen Rigby's son; Kathy Permenter, Derrick Stewart's mother; and Willie Golden, Robert Golden's brother. Flowers contends that the trial court erred in permitting victim-impact testimony during the penalty phase because the testimony did not relate to the statutory aggravating factors. Flowers also claims that the admission of victim-impact testimony violated the Eighth Amendment.

¶ 193. Recently, in *Batiste*, we held that victim-impact testimony did not violate the Eighth Amendment:

> Victim impact statements are those which describe the victim's personal characteristics, the emotional effect of the crimes on the victim's family, and the family's opinions of the crimes and the defendant. *Edwards v. State*, 737 So.2d 275, 291 (Miss. 1999). The United States Supreme Court has held that there is no *per se* bar to victim-impact testimony. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (Miss. 1991). This testimony is admissible at the sentencing phase, but not in the culpability phase. *Havard v. State*, 928 So.2d 771, 792 (Miss. 2006). We will allow relevant victim-impact testimony in narrow circumstances as is constitutionally permissible. *Id.* When the evidence is proper, necessary to a development in the case and the true characteristics of the victim, and could not incite the jury, the testimony is admissible. *Id.* (quoting *Jenkins v. State*, 607 So.2d 1171, 1183 (Miss. 1992)) .... We decline to disregard the United States Supreme Court's pronouncement in *Payne*, and will continue to adhere to the standard enunciated above.

*Batiste*, 121 So.3d at 864 (¶ 147). On several occasions, we have permitted victim-impact testimony that described the impact of the victim's death on his or her family. *See Keller v. State*, 138 So.3d 817, 865 (¶ 131) (Miss. 2014); *Batiste*, 121 So.3d at 864 (¶ 148); *Havard v. State*, 928 So.2d 771, 792 (¶ 37) (Miss. 2006); *Branch v. State*, 882 So.2d 36, 68 (¶¶ 96–97) (Miss. 2004). In *Havard*, the Court found that it was not error to admit the testimony of the victim's grandmother, who stated, "[j]ustice means [the victim's] life was taken, and there is only one way that we can find justice .... A life for a life." *Havard*, 928 So.2d at 792 (¶ 36). The Court noted, however, that the "vast majority" of the witness's testimony "went straight to the relationships between her family members, including [the victim], and the impact losing [the victim] had on them, all part of permissible testimony under our case law." *Id.* at 792 (¶ 37).

¶ 194. Flowers cites *Berry v. State* for the proposition that victim-impact testimony must be relevant to a statutory aggravating circumstance, and that case does provide that victim-impact testimony is admissible "if it is necessary to develop the case, and if it is relevant to any of the aggravating circumstances." *Berry*, 703 So.2d at 275–76. However, we rejected the *1152 same argument in *Keller v. State*. In *Keller*, the defendant cited *Berry* and argued that victim-impact testimony was not permissible when "it did not relate to any of the aggravating factors." *Keller*, 138 So.3d at 865 (¶ 129). The testimony in *Keller* described "the emotional effect of the crime on the victim's son and his opinion of the crime." *Id.* at 865 (¶ 131). Despite the statement in *Berry*, we held that the testimony was "permissible under the Court's precedent on victim-impact statements." *Id.*

¶ 195. In today's case, the victim-impact testimony was consistent with the testimony presented in *Keller* and *Havard*. At the sentencing phase, Roxanne Ballard testified about her relationship with her mother and the effect her mother's death had on her life. Likewise, Brian Rigby, Kathy Permenter, and Willie Golden testified about the impact their family members' deaths had on them and their families. The above-described type of victim-impact testimony is permissible, and the issue is without merit.

XII. Whether the death sentence in the instant matter is constitutionally and statutorily disproportionate.

[84]¶ 196. Mississippi Code Section 99–19–105(3) requires the Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Miss. Code Ann. § 99–19–105(3) (Rev. 2015). The Court consistently has "upheld the death penalty in cases involving capital murders committed during the commission of a robbery." *Batiste*, 121 So. 3d at 873 (¶ 183) (citing *Gillett*, 56 So.3d at 524; *Fulgham*, 46 So.3d at 323; *Goff*, 14 So.3d at 650; *Chamberlin v. State*, 989 So.2d 320, 345 (Miss. 2008); *Doss v. State*, 709 So.2d 369, 401 (Miss. 1997); *Chase v. State*, 645 So.2d 829, 836–37 (Miss. 1994)). Further, the Court has upheld the imposition of the death penalty in cases involving multiple victims. *See Manning*, 765 So.2d at 522 (¶ 17). As such, the issue is without merit.

XIII. Whether the Court should set aside its prior order denying Flowers's motion for remand and leave to file

supplemental motion for new trial.

¶ 197. In May 2012, Flowers filed a motion for remand and leave to file supplemental motion for new trial on the basis that the State failed to disclose information relating to the credibility of one of its witnesses, Patricia Hallmon Sullivan Odom. Approximately four months prior to the start of Flowers's sixth trial, a federal grand jury indicted Odom for tax fraud. Odom's trial was in September 2010—three months after Flowers's trial. Flowers contends that the State should have disclosed Odom's indictment. Flowers's motion was based on the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In response to Flowers's motion, the State claimed that the issue should not be presented to the Court through motion or direct appeal because the issue was not presented to the trial court. The State also submitted District Attorney Doug Evans's affidavit, which provided that he was not aware of Odom's indictment until after Flowers's trial. The Court denied Flowers's motion. Because the issue was not presented to the trial court, it is not proper on appeal.

*1153 XIV. Whether the cumulative effect of the errors mandates reversal of the verdict and/or the sentence of death entered pursuant to it.

¶ 198. Flowers claims that, even if the Court has doubts about the harm of any one error in isolation, the cumulative effect of the errors warrants reversal. Certainly, the Court often has applied the cumulative-error doctrine in capital cases where, "although no error, standing alone, requires reversal, the aggregate effect of various errors may create such an atmosphere of bias, passion[,] and prejudice that they effectively deny the defendant a fundamentally fair trial." *Goff*, 14 So.3d at 672 (¶ 210) (citation omitted). That is not the case here. We have thoroughly reviewed the briefs, arguments, record, and trial transcript, and we have determined that each issue raised by Flowers is without merit. Therefore, as there are no individual errors, there is no cumulative error.

Conclusion

¶ 199. Each issue raised by Flowers is without merit. Flowers's four convictions for capital murder and sentences to death were properly decided by the jury, and we affirm.

¶ 200. AFFIRMED.

RANDOLPH, P.J., MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR. WALLER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED B Y KITCHENS, P.J., AND ISHEE, J. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J.; WALLER, C.J., JOINS IN PART.

WALLER, CHIEF JUSTICE, DISSENTING:

¶ 201. Because the prosecution's mischaracterizations of the evidence during closing arguments affected Flowers's fundamental right to a fair trial, I respectfully dissent.

¶ 202. Prosecutors are afforded the right to argue facts that are in evidence. *Henton v. State*, 752 So.2d 406, 409 (¶ 11)

(Miss. 1999). "However, arguing statements of fact that are not in evidence or necessarily inferable from it which are prejudicial to the defendant is error." *Dancer v. State*, 721 So.2d 583, 589 (¶ 31) (Miss. 1998). As discussed by Justice King, the prosecution in this case mischaracterized evidence during closing arguments. Two of those misstatements—the timing of Sam Jones's arrival at Tardy's and Flowers's motive—the prosecution similarly used in *Flowers II*, where we found reversible error. *Flowers v. State*, 842 So.2d 531, 555 (¶ 71) (Miss. 2003) (*Flowers II*).

¶ 203. While it is true that fourteen prosecutorial misstatements were alleged in *Flowers II* as opposed to only four misstatements in the case *sub judice*, this Court uses heightened scrutiny when the death sentence is imposed. *Cox v. State*, 183 So.3d 36, 44 (¶ 17) (Miss. 2015). "This higher level of scrutiny requires that all doubts be resolved in favor of the accused because 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.' " *Bennett v. State*, 933 So.2d 930, 939 (¶ 17) (Miss. 2006) (citations omitted). Applying heightened scrutiny, I find plain error in the prosecution's mischaracterizations, particularly given our admonishments in *Flowers II*. Therefore, I would reverse the judgment in this case and remand for a new trial.

KITCHENS, P.J., AND ISHEE, J., JOIN THIS OPINION.

KING, JUSTICE, DISSENTING:

¶ 204. In two previous direct appeals, this Court has reversed Flowers's conviction •1154 and death sentence as a result of prosecutorial misconduct. In *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*), the prosecution's argument of facts not in evidence resulted in reversal. Finding that a *Batson*[2] violation had occurred, this Court reversed and remanded *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (*Flowers III*), for a new trial. Despite the same errors occurring in the trial that is the subject of this appeal, the Majority, in a stark departure from this Court's previous *Flowers* opinions, found that Flowers's conviction and death sentence should be affirmed. The United States Supreme Court then granted Flowers's petition for a writ of certiorari, vacated our judgment, and remanded the case (a "GVR") to this Court for further consideration. The United States Supreme Court finds that a GVR is potentially appropriate

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation[.]

*Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (emphasis added). To put it simply, the United States Supreme Court issued a GVR in this case because a majority of its members believed that a reasonable probability exists that this Court got it wrong on the first try. Yet, this Court ignores that strong implication and makes the same erroneous decision on remand. Because the errors in this case, particularly the denial of Flowers's *Batson* claims highlighted by the United States Supreme Court, resulted in Flowers being denied his right to a fair trial, I dissent.

I. Prosecution's Argument of Facts Not in Evidence

¶ 205. Three instances of the prosecution arguing facts not in evidence appear in today's case: (1) the prosecution misstated the time Sam Jones discovered the victims' bodies at Tardy's; (2) the prosecution stated an unsupported basis for Flowers's alleged motive; and (3) the prosecution incorrectly described Porky Collins's reaction to the photo arrays.

In *Flowers II*, 842 So.2d at 550, the prosecution's misstatement of facts during closing argument was one basis, *inter alia*, for this Court's reversal. In that appeal, Flowers cited approximately fourteen alleged misstatements. *Id.* at 555. This Court found that the following misstatements by the prosecutor resulted in an unfair trial: (1) that defense witnesses tried to coerce the State's witnesses to lie; (2) that Sam Jones received a call at 9:30 a.m. from Bertha Tardy asking him to come to the store; and (3) that Flowers "was mad" about losing his job and having his pay docked. *Id.* at 555–56.

¶ 206. The statements that resulted in this Court reversing Flowers's conviction and death sentence in *Flowers II* are notably similar to the statements raised in today's case. While this repetition of prosecutorial misconduct is alarming, the Majority's approval of the same is even more startling. Courts have long recognized—and reasonably feared—that misconduct during closing argument may become commonplace in our trial courts. Despite regular admonishments, such misconduct still occurs:

> That despite our consistent warnings to the Government we should still be called upon to admonish against such conduct *1155 is reprehensible per se because it constitutes a disregard for our directives. But additionally it is particularly pernicious because it results in an unnecessary waste of judicial resources, both at the trial and appellate level, by diversion and attention to review of what now should be understood to be totally unacceptable conduct by those who lay claim to representing the Government ....

*U.S. v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983). The Majority in today's case, by endorsing the prosecutor's misstatements—the same misstatements which warranted reversal in *Flowers II*—takes Mississippi one step closer to having misrepresentation of the facts presented at trial commonplace in our trial courts.

A. Sam Jones's Testimony Regarding His Arrival at Tardy's

¶ 207. Sam Jones died prior to Flowers's 2010 trial, and his testimony from Flowers's 2007 trial was read into evidence. Flowers claims that the State misrepresented Jones's testimony regarding the timeline of events the morning of the murders. Jones testified as follows:

> A. Well, [Bertha Tardy] called me and asked me—I had promised her I would come down and help them load out a truck and go on a delivery. And she called me to ask me about was I coming down there. And I told her that I was. And then about, that was about 15 minutes after 9:00, I think, when she called, somewhere along in there.
>
> Q. About what time did you get to the store that morning, Mr. Jones?
>
> ....
>
> A. I got to the store; it was before—it was right at, between 9:15 and 9:30.
>
> Q. Okay.
>
> A. I will put it like that. It wasn't 9:30.
>
> Q. Okay. You got to the store between 9:15 or right around that time?

A. Yes.

Although Jones testified that he arrived at Tardy's between 9:15 and 9:30 a.m., the State attempted to question Jones later about the timeline and misstated that he arrived closer to 10:00 a.m.:

Q. Okay. And I think—I might have misled you a little bit. It was, when you got to the store, that was going to be closer on up to 10 o'clock, wasn't it?

Flowers's Counsel: Object to leading, Your Honor.

Court: Overruled.

Jones never responded to this question.

¶ 208. In its closing argument, the State discussed the timeline for the morning of the murders and apparently put the timeline on some type of marker board. During the timeline discussion, the prosecution stated: "Mr. Sam Jones came into the store slightly after 10:00 on the morning of the 16th and discovered the bodies." Flowers did not object to this statement at closing argument.

¶ 209. In *Flowers II*, 842 So.2d at 511, this Court addressed whether this same issue was procedurally barred by lack of contemporaneous objection. This Court applied plain error to the issue, and found that the prosecution's misstatements warranted reversal. *Id.* "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Williams v. State*, 794 So.2d 181, 187 (Miss. 2001) (citing *Gray v. State*, 549 So.2d 1316, 1321 (Miss. 1989)), *overruled on other grounds by Foster v. State*, 148 So.3d 1012 (Miss. 2014).

¶ 210. In *Flowers II*, 842 So.2d at 555, the prosecution stated that Sam Jones had testified that Bertha Tardy had called him •1156 at 9:30 a.m. Reviewing this statement, this Court stated:

> After a thorough examination of the record, it is clear from Jones's testimony that he testified he arrived at Tardy's at 9:30. He never once stated he was called at 9:30 on the morning of July 16, but he did testify he arrived at the store around 9:30. On direct examination, the State never questioned Jones about a specific time. He only stated he received a call from Mrs. Tardy on the morning of July 16. On cross-examination, Jones was asked what time he arrived at Tardy's, and he answered it was around 9:30.

*Id.* at 556. This Court then found that "[t]he cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny Flowers his right to a fair trial." *Id.*

¶ 211. Flowers claims that the statement in today's case prejudiced him by essentially skewing the timeline in the State's favor. Porky Collins and Clemmie Flemming both testified that they saw Flowers near Tardy's around 10:00 a.m. Flowers claims that if Jones's testimony had been accurately described—that he arrived at the store between 9:15 and 9:30—the question of what Flowers was doing so close to the scene of a murder thirty to forty-five minutes after the murders could have occurred would have been raised in the jurors' minds.

¶ 212. There is no doubt that the prosecutor's statement is not supported by Sam Jones's testimony and that there is no direct evidence supporting the contention that Jones arrived at Tardy's at 10:00 a.m. The prosecution's statement is not based on facts and prejudiced Flowers by deliberately painting an incorrect picture for the jury of the events surrounding the discovery of the murders—this same picture was painted in *Flowers II*.

B. Flowers's Motive

¶ 213. The second misstatement Flowers cites relates to his alleged motive to commit the murders. Similar to Sam Jones's testimony and the timeline described above, misstatements related to Flowers's motive were another basis for this Court's reversal in *Flowers II*, 842 So.2d at 556. In *Flowers II*, 842 So.2d at 555–56, this Court found that the prosecution's statement that Flowers "was mad" as a result of losing his employment with Tardy's was a misstatement of the facts:

> [T]he prosecutor argued to the jury that [Robert] Campbell had testified that Flowers was mad because Mrs. Tardy had terminated his employment and was holding money out of his paycheck to cover the damaged batteries. Defense counsel objected on the basis that the prosecutor was mischaracterizing Campbell's testimony, and when the prosecutor responded that he was quoting verbatim from his notes, the trial court overruled the defense objection. ... After a thorough examination of Campbell's testimony, it is clear Campbell never testified Flowers was upset at Mrs. Tardy. The State never questioned Campbell about Flowers's feelings toward Tardy or about any money. On redirect, Campbell was asked if Flowers ever mentioned anything was wrong with Mrs. Tardy, and Campbell stated Flowers never mentioned anything to him.

*Id.*

¶ 214. In today's appeal, Flowers claims that the following statement by the prosecutor was not based on facts in evidence:

> The investigators learned pretty quickly when they asked who in the world could have had some reason, some motive, some anything to attack four people like this.
>
> *1157 Have you had anybody that's had beef with the store? Just one. Well, that doesn't mean he did this though, does it? No. But you check that out. You look at him. And in the course of deciding what, if anything, Curtis Flowers had to do with this crime.

Flowers claims that no evidence was presented at trial supporting the contention that he was angry as a result of his termination. In response, the State argues that the following supports the contention that Flowers "had beef" with Tardy's:

1. Flowers losing his job days prior to the murders.

2. Bertha Tardy deducting the cost of damaged inventory from Flowers's paycheck.

3. Police Chief John Johnson's testimony that the Tardy family considered Flowers a threat:

> Q. Okay. How did Curtis Flowers become a suspect by then, by 6:30?

A. I knew that the Tardy family had considered Curtis a threat and that they were concerned about their safety dealing with him.

4. Investigator Jack Matthew's testimony about employees who had been fired from Tardy's:

Q. You asked who else had worked there the last couple of years and those kind of things?

A. Well, we asked if there was anybody that they'd had any problem with or anybody that had been fired from there, and that was the—Curtis was the only one.

5. Doyle Simpson's testimony that Flowers had "problems" with Tardy's:

Q. Okay. Did you know anything about Curtis having any problems with Tardy Furniture.

A. I had heard about it.

¶ 215. This evidence cited by the State supports the contention that Tardy's employees were concerned about Flowers. But the feelings and perceptions of Tardy's employees must be distinguished from Flowers's perception. The statements cited by the State do not establish that Flowers had ill will toward Tardy's employees. Further, Doyle Simpson's testimony is too vague to support a statement that Flowers "had beef" with the store. "Problems" could easily refer to the firing itself or the damaged inventory. The State's contention that Flowers "had beef" with Tardy's is unsupported by the facts. As this Court recognized in *Flowers II*, this factually unsupported statement resulted in Flowers having an unfair trial.

C. Porky Collins's Response to Photo Arrays

¶ 216. Next, Flowers claims that the prosecutor misrepresented Porky Collins's response to the first photo array—the array that contained a photograph of Doyle Simpson. Flowers claims that this misrepresentation was particularly prejudicial because part of his defense was based on the alternative theory that Doyle Simpson was the perpetrator. Collins saw two African–American men arguing outside Tardy's the morning of the murders. When Collins testified, he stated that he did not remember if he identified Simpson as one of the men standing outside Tardy's. The notes taken during the photo arrays state that Collins had the following reaction to the array containing Simpson's photo:

# 1 and # 3 resembles, but hairline was further back

# 6 pointed to Simpson, said hairline like this, may have appeared a little darker.

"But it looks like him."

"Face was also same shape, round like this."

•1158 "Unable to be positive."

Investigator Wayne Miller testified that Collins did point out Simpson during the photo array:

> Q. All right. So he did actually point out Mr. Simpson here as somebody who was—looks like the person he'd seen; is that a fair characterization?
>
> A. Right.

¶217. The State presented the following closing argument related to Collins's identifications:

> When Porky found out that some people had been murdered in front of Tardy's, he told James Taylor Williams. He said I saw something I think y'all ought to know about. He said I think I can identify that guy if I see him again. Now, here's the interesting thing about Mr. Porky Collins. Porky didn't know Curtis. Never claims to have ever seen him before. Didn't know him. Didn't know those other people, as far as them having seen him. Porky says I can identify him.
>
> I'm going to refer to this some more in a minute but I just want you to—you've seen these. We had them passed to y'all. Here are two line-ups. These line-ups were shown to Porky at the same setting. First was this one that has Doyle Simpson's picture on it. Because later on when they did this line-up, they already knew that the gun came out of Doyle's car. And so they gave this thing to Porky first and said is the guy that you saw in front of Tardy's in this group.
>
> Now, if he was going to make a misidentification, ladies and gentlemen, that would have been the perfect time for him to pick one of these guys and say yeah, there he is right there. But you know what? Porky did not misidentify anybody. He said the guy ain't there. They took another six photographs and said look at this second set. He said that's him right there. You heard Mr. Miller talk about Porky, said he was positive. He made a positive identification.
>
> Now, why is Porky's i.d.—Porky doesn't know him. Porky wasn't able to say yeah, I know him. When he saw the photograph of Curtis Flowers, he pointed him out. So you have got two different kinds of identifications and they agree. You've got identification by all these witnesses who knew him, Porky, who didn't know him, and they both agree. And he was offered—Porky was offered a prime chance to mess up. The perfect chance to make a mistake. He almost—it didn't develop out that way it, but it was almost like a trick.
>
> You know, see if he is in there. No, he is not. Is he in the second group? Yeah. That's him right there. So that's a pretty strong identification, isn't it?

¶218. While the State correctly characterized Collins's identification of Flowers in the second photo array, the State deliberately failed to recognize Collins's statement that Simpson's photograph in the first array "looks like" a man he saw outside of Tardy's and that he was "unable to be positive." The State's argument that Collins stated "the guy ain't there" was not an accurate representation of Collins's identification. Because Flowers's defense was based, in part, on the argument that Doyle Simpson was a likely suspect for the murders, the State's misstatement regarding Collins's identification of Simpson prejudiced Flowers.

¶219. As in *Flowers II*, the prosecution's repeated argument of facts not in evidence in today's case prejudiced Flowers and denied him his right to a fair trial. Under this Court's heightened review of death penalty cases, these

misstatements—standing alone—should be enough *1159 to warrant reversal. *See Fulgham v. State*, 46 So.3d 315, 322 (Miss. 2010) ("What may be harmless error in a case with less at stake becomes reversible error when the penalty is death."). This Court's prior admonishment of essentially the same statements in *Flowers II* bolsters a finding of reversal. *See U.S. v. Drummond*, 481 F.2d 62, 62 (2d Cir. 1973) ("Because of the repeated misbehavior of this prosecutor in this and prior cases, we feel compelled to reverse the decision of the trial court on the sole ground of prosecutorial misconduct.").

II. Jury Selection Process

¶ 220. Flowers claims that the State violated the Equal Protection Clause of the Fourteenth Amendment when it struck five African–American jurors after utilizing disparate questioning and citing pretextual reasons. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, ——U.S. ——, 136 S.Ct. 1737, 1747, 195 L.Ed.2d 1 (2016) (internal quotations omitted). Because a review of the record in today's case reveals that a *Batson* violation did occur, I dissent.

¶ 221. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Racial prejudice in the prosecution's jury selection results in "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Thus, for years, courts have held that racial discrimination by the State during the jury selection process violated the Equal Protection Clause. *Miller–El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)).

¶ 222. In an effort to remedy the prejudices existing in jury selections, the United States Supreme Court has, over the years, developed various standards for establishing purposeful discrimination. In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court attempted to regulate purposeful discrimination through presuming the legitimacy of prosecutors' strikes except in the case of longstanding patterns of discrimination—when in case after case no African Americans served on juries, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted."

¶ 223. *Swain*'s approach did little to remedy the problem of purposeful discrimination in jury selection. Thus, in *Batson*, the United States Supreme Court "held that a defendant could make out a prima facie case of discriminatory jury selection by 'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial." *Miller–El*, 545 U.S. at 239, 125 S.Ct. 2317 (quoting *Batson*, 476 U.S. at 94, 106 S.Ct. 1712). The State must then come forward with race neutral bases for the peremptory strikes. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. "The trial court then has the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712.

¶ 224. *Batson*, however, is not without flaws. Thus, in *Miller–El*, the United *1160 States Supreme Court refocused on all of the relevant circumstances of the case, rather than just the proffered race-neutral bases provided by the State:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given

case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

*Miller–El*, 545 U.S. at 239–40, 125 S.Ct. 2317 (citing *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712).

¶ 225. Thus, in finding that a *Batson* violation occurred in today's case, I consider all of the relevant circumstances in Flowers's case.

A. History of Flowers's Case

¶ 226. In *Flowers III*, 947 So.2d at 935, this Court found as "strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." In *Flowers III*, the State exercised all twelve of its peremptory strikes on African Americans and all three of its strikes of alternate jurors on African Americans. After reviewing the individual strikes in the case, this Court found that the State engaged in purposeful discrimination during jury selection. *Id.* at 939. Thus, the Court reversed and remanded for a new trial on this basis. *Id.* The same prosecutor who this Court found had engaged in purposeful discrimination in *Flowers III* prosecuted the trial before this Court on appeal today. On its own, this fact is not dispositive of a finding of racial discrimination. This history, however, cannot be ignored and is part of the relevant circumstances that must be considered in this case.

¶ 227. In *Miller–El*, 545 U.S. at 253, 125 S.Ct. 2317, the United States Supreme Court considered the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time [the defendant's] jury was selected." If the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of the *same prosecutor in the retrial of the same case* is a legitimate consideration. To fail to consider this history is to rebuff *Batson*'s direction that "all relevant circumstances" must be considered. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller–El*, 545 U.S. at 239–40, 125 S.Ct. 2317.

B. Disparate Treatment—The Numbers

¶ 228. Like the history of today's case, a review of the statistics relating to the prosecutor's use of peremptory strikes is not, standing alone, dispositive of the *Batson* inquiry. These numbers, however, reveal a clear pattern of disparate treatment between white and African–American venire members. In today's case, a special venire of 600 citizens was drawn. The original venire consisted of forty-two percent African Americans. After the jury qualification and initial for-cause challenges, the venire consisted of twenty-eight percent African Americans. Ultimately, one African American *1161 served as a juror and one African American served as an alternate juror. Despite the initial venire consisting of forty-two percent African Americans, the jury that convicted and sentenced Flowers consisted of eight percent African Americans.

¶ 229. An analysis of the number and type of questions asked by the prosecutor further reveals a pattern of disparate treatment. During individual voir dire, the prosecutor asked white jurors an average of approximately three questions. African–American jurors, however, were asked approximately ten questions each by the prosecutor.

¶ 230. Further, in what appears to be mere lip service to the voir dire process, when questioning most white jurors during individual voir dire, the prosecutor essentially repeated questions that the trial court had just asked. The trial court asked each juror standard death-penalty-qualification questions. The prosecutor would then—in substance—ask the same questions and then hand the juror off to be questioned by the defense. The prosecutor asked only nine percent of white jurors something beyond these duplicated questions.

¶ 231. In a stark contrast, the prosecution asked sixty-three percent of African Americans questions outside the standard death-penalty-qualification questions. As an example, fifty-five percent of African–American jurors who had some kind of connection to the Flowers family (through work, the community, or family) were asked questions by the prosecutor about this connection. Although five white jurors had similar connections to the Flowers family (through work and the community), the prosecutor failed to ask any questions about these connections.

¶ 232. As noted in *Miller–El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), statistical analysis can raise a question as to whether race influenced the jury selection process. The numbers described above are too disparate to be explained away or categorized as mere happenstance.

C. Individual Jurors

¶ 233. The pattern of disparate treatment is further revealed when comparing the treatment of individual jurors. *See Flowers III*, 947 So.2d at 921 (citing *Manning*, 765 So.2d at 519) (A side-by-side comparison of jurors is helpful to determine whether purposeful discrimination existed.). Explanations by the prosecution are difficult to credit where the State accepted white jurors with the same traits it used to strike black jurors. *Foster*, 136 S.Ct. at 1750.

1. Carolyn Wright

¶ 234. The State exercised one of its peremptory strikes on Carolyn Wright for the following reasons: (1) she knew several of the defense witnesses; (2) she was sued by Tardy's for an overdue account; and (3) she used to work with Flowers's father, Archie Flowers, Sr. During the *Batson* hearing, Flowers rebutted the State's bases for its peremptory strike first by noting that Pamela Chesteen, Harold Waller, and Bobby Lester all had a significant number of acquaintances involved in the case. Flowers responded to the fact that Tardy's had sued Wright by noting that the State had not questioned white jurors regarding their accounts at Tardy's. Finally, Flowers rebutted the basis relating to Wright's working relationship with Flowers's family by comparing Wright to Chesteen, who was a bank teller at a bank where the members of the Flowers family were customers.

¶ 235. Finding that the State's reasons for striking Wright were race-neutral, the trial court specifically noted that all jurors *1162 were asked by the court during group voir dire if they had accounts with Tardy's and whether they had been sued by Tardy's. The court found that this basis was race neutral because none of the white venire members reported that they had been sued by Tardy's. The trial court found that Wright's working relationship with Archie Flowers was distinguishable from the professional relationship Chesteen had with the Flowers family. Specifically, the court stated that the Winona Walmart was a "relatively small" Walmart and seemed to imply that Wright had a close relationship with Archie Flowers because of the small size of the store. The trial court also stated that no white jurors had reported working at Walmart with Archie Flowers. The trial court summed up its finding by stating:

> If the only reason the State offered was that she knows some of these defense witnesses, then there might be something there. But the fact is knowing these defense witnesses that you're intending to call, plus the fact that Tardy's had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her.

Each of the State's reasons for the peremptory strike is analyzed below.

*Wright's Relationships with Persons Involved in the Case*

¶ 236. In sum, Carolyn Wright had some type of connection to thirty-four people involved in Flowers's case. Flowers compares Wright to Chesteen, who knew thirty-one people involved in Flowers's case; Waller, who knew eighteen people involved in the case; and Lester, who knew twenty-seven people involved in the case.

¶ 237. Similar to Wright, Chesteen, Waller, and Lester all had a significant number of relationships with witnesses and persons involved with the case. One indicium of pretext this Court considers is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Flowers III*, 947 So.2d at 917 (quoting *Manning*, 765 So.2d at 519). Indeed, " '[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.' " *Foster*, 136 S.Ct. at 1754 (quoting *Miller-El*, 545 U.S. at 241, 125 S.Ct. 2317). As such, this basis is suspect.

¶ 238. Flowers also claims that the State mischaracterized Wright's relationships with Flowers's family. Specifically, Flowers points out that the State claimed that Wright knew Flowers's sister, Sherita Baskin. Wright, however, never indicated that she knew Baskin. The State does not address this in its brief. This one statement could have simply been a slip of the tongue. However, "lack of support in the record for the reason given for a peremptory strike has been identified as an indicator of pretext." *Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519). *Foster* emphasized this notion, noting that the prosecutor's "misrepresentations of the record" constituted evidence that a strike was motivated in substantial part by discriminatory intent. *Foster*, 136 S.Ct. at 1754.

*Wright's Litigation with Tardy's*

¶ 239. Flowers claims that the State mischaracterized Wright's litigation with Tardy's by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. The only statements Wright made regarding the actual litigation were that she was sued, but that "it was paid off." Wright also stated that her involvement with the litigation would not affect her if she were selected as a juror. During the *Batson* *1163 hearing, the State produced a copy of the judgment in Wright's case, and Flowers's counsel asked if a garnishment order was attached. The trial court did not directly respond to this question, but instead stated that "it's an abstract of justice court where she was sued." Because there is no evidence that Wright's wages were garnished, the State did mischaracterize its basis for the peremptory strike. Further, unlike the misstatement discussed above relating to Wright's acquaintance with Sherita Baskin, the statement that Wright had her wages garnished seems to go directly to reasoning for the State's strike—that Wright would have some sort of ill will toward Tardy's as a result of her wages being garnished. It is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages. As such, the State's unsupported characterization of the lawsuit is problematic. *See* *Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519); *Foster*, 136 S.Ct. at 1754.

*Wright's Working Relationship with Archie Flowers, Sr.*

¶ 240. Wright worked with Flowers's father, Archie Flowers, Sr., at Walmart; and on its face, this basis seems to be race-neutral. *See* *Manning*, 735 So.2d at 340 (This Court "has condoned a peremptory challenge against a juror who was acquainted with the defendant's family."). However, a review of the record reveals that this basis may have been pretextual. Although the State cited Wright's working relationship with Archie Flowers as a basis for its strike, the State made no effort during voir dire to question Wright about the working relationship beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in

different departments and during different shifts. Further, Wright stated during group voir dire that she was unaware of whether Archie Flowers still worked at Walmart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect. *See Miller-El*, 125 S.Ct. at 2328 (failing to conduct meaningful voir dire on subject with which State is allegedly concerned suggests that "explanation is a sham and a pretext for discrimination").

¶ 241. The questionable nature of the State's reason is compounded by its failure to strike Pamela Chesteen. Chesteen worked at a local bank in Winona and stated that she knew Archie Flowers, Sr., Lola Flowers, and Flowers's sisters from her work at the bank. Although the coworker relationship and bank-employee/customer relationship are not exactly comparable, the concern relating to the influence such relationships would have on a juror are the same—a concern that the coworker or employee would be influenced toward a family member of another coworker or a customer. The disparate treatment of Wright and Chesteen, along with the failure to conduct meaningful voir dire regarding Wright's working relationship with Archie, Sr., suggests this basis for the State's peremptory strike was pretext. *See Flowers III*, 947 So.2d at 924 ("Failure to voir dire as to the characteristic cited for the strike is also an indicator of pretext.").

¶ 242. When the State's bases and the record in today's case are viewed *in toto*, evidence of disparate treatment and pretext exists. *See id.* at 937 ("Though a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge *1164 only upon members of a particular race.").

2. Dianne Copper

¶ 243. The State provided the following reasons for striking Dianne Copper: (1) she worked with Archie Flowers and Cora Flowers, Flowers's sister; (2) she knew several members of the Flowers family; (3) she stated that she "leaned towards" Flowers's side of the case; and (4) she knew several defense witnesses. For the most part, the State focused on Copper's statement that she would lean toward Flowers as a result of her relationships with the Flowers family.

¶ 244. Flowers rebutted the State's reasons by again noting that several white jurors with multiple connections to persons involved in the case had not been challenged by the State. Flowers also argued that the State did not attempt to rehabilitate Copper when she stated that she would lean toward Flowers's side of the case. The trial court accepted the State's reasons as race neutral, finding that Copper's relationships with persons connected to the case were distinguishable from those of the white jurors not challenged by the State. The trial court also found that Copper was distinguishable from other jurors because she stated that she would tend to favor Flowers's side of the case and had worked with Flowers's father and sister.

*Copper's Relationships with Persons Connected to the Case*

¶ 245. Similar to his argument relating to Carolyn Wright, Flowers claims that the State's strike of Copper was pretextual because white jurors who knew several defense witnesses were not struck. Further, Flowers claims that the State mischaracterized Copper's statements relating to whether she "leaned towards" Flowers in the case as a result of her relationship with the Flowers's family.

¶ 246. Copper knew thirty-one people involved in the case. Copper also testified about her relationship with the Flowers family and witnesses during voir dire:

Q. Now, I noticed that you told us the other day that you lived on Harper Street at one time?

A. Yes, sir.

Q. That y'all [Copper and the Flowers family] lived on the same street.

A. Not on the same street. Because they—they live on Cade Street, and I lived on Harper Street.

Q. Don't they live on the corner of Cade and Harper?

A. Well, I guess. I'm not—I—you know, my street is Harper and then its—as it go around—that's where I assume it was Cade Street. I'm not positive.

Q. Okay. And you've stated that you worked with the defendant's sister at Shoe World?

A. That's correct.

Q. And which sister was that?

A. Cora.

Q. How long did y'all work together?

A. Probably a year or two.

Q. Okay. You worked with the defendant's father?

A. Yes, sir.

Q. How long did you work with him?

A. Estimating, probably—possibly about the same, one to two years.

Q. Okay. And I want to make sure my notes are right, because we can all write down things wrong. You stated that you knew his father Archie Flowers.

A. Yes, sir.

Q. You know his brother, Archie, Jr.?

A. Yes, sir. I know his brother.

Q. You know his mother Lola?

A. Yes, sir, I do.

•1165 Q. You know witnesses in this case, Hazel Jones?

A. Yes, sir, I know her.

Q. You know Kittery Jones, a witness in this case?

A. Yes, sir, I know him.

Q. And you know Danny Joe Lott, a witness in this case?

A. Yes, sir.

Q. And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connection to all of these people. Is that correct?

A. It—it's possible.

Q. Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?

A. Yes, sir.

Q. And it would make it to where you couldn't come in here and, just with an open mind, decide the case, would it?

A. Correct.

¶ 247. Flowers's counsel attempted to rehabilitate Copper:

Q. ... What I'm trying to find out is just as you could put aside all the information you heard before about this case, could you not also put aside the fact—if you got picked as a juror, put aside the fact that you have met Mr. Flowers, that you know some other people in these cases and be fair to the Tardys, the Stewarts, the Goldens, and Rigbys, and make whatever decision or vote that you're going to make based on the evidence and the evidence only. Could you do that?

A. I feel like I could. But, you know, it—

Q. Is what you're saying—

A. Of course, it would make me, you know, feel uncomfortable. But if I had to do it, you know, I got to do what I got to do.

Q. Okay. So you're saying that—thank you. You're saying that you'll be uncomfortable. You'd prefer not to—I get the impression you're saying that you'd rather not be a juror. But if you got picked to be one, you would take the responsibility seriously, and you would follow the law and the rules that the Court give[s] you, and you would put aside anything that you are required to put aside and make your evidence and make your vote based on just the evidence you hear in the courtroom. Is that fair to say?

A. Yes, sir. That's correct.

¶ 248. As mentioned above, one indicium of pretext is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Id.* at 917 (quoting *Manning*, 765 So.2d at 519). As such, the State's basis that Copper knew several witnesses in the case is suspect. While the other bases the State provided appear to be race neutral—namely, Copper's relationship with Flowers's family and the possibility that it could cause her to "lean toward" Flowers, the unchallenged jurors with a shared characteristic must still be considered.

3. Flancie Jones

¶ 249. The State provided the following reasons for striking Jones: (1) she is related to Flowers; (2) she was late for jury selection on two separate occasions; and (3) she provided inconsistent statements on her view of the death penalty by lying on her juror questionnaire in an attempt to avoid serving as a juror. After reviewing the record, the State's bases for striking Jones appear to be race-neutral.

*1166 4. Tashia Cunningham

¶ 250. The State cited Cunningham's working relationship with Flowers's sister and her wavering statements on the death penalty as bases for its peremptory strike. During the *Batson* hearing, Flowers's counsel rebutted the State's reasons by pointing out that Cunningham stated that she could set aside her relationship with Flowers's sister and be a neutral juror. Defense counsel also compared Cunningham to Chesteen, the juror who knew several of Flowers's family members from working at a local bank. Finally, Flowers's counsel compared Cunningham's alleged wavering

views on the death penalty to views of white jurors. The trial court found that both of the State's reasons were race-neutral:

> And Ms. Cunningham's all-over-the-map response to the death penalty, plus her situation about working so closely with Mr. Flowers's sister, in my mind, the State has shown race-neutral reasons for that strike.

*Cunningham's Working Relationship with Flowers's Sister*

¶ 251. During voir dire, Cunningham stated that she and Sherita Baskin, Flowers's sister, did not have a close relationship; Cunningham described it as a "working relationship." According to Cunningham, she and Baskin would "sometime" see each other, but would not see each other at work every day. Cunningham also stated that she worked at the end of the assembly line, and Baskin worked at the front of the line. The two women worked the same shift for two or three years.

¶ 252. Apparently, the State called Cunningham's employer, ADP, to confirm her testimony relating to her working relationship with Baskin. During individual voir dire, the State asked Cunningham further questions about the relationship:

Q: And you work with the Defendant's sister, Sherita Baskin?

A: Yes.

Q: Now, the other day, I think you said that you do not work close to her?

A: No, I do not.

Q: Would you think about that for a minute?

A: I do not.

Q: Are you sure that you do not work side by side with her?

A: No, I do not.

Q: And you're saying that under oath?

A: Yes, sir.

¶ 253. In response to Cunningham's statements, the State called an ADP quality control clerk, Crystal Carpenter, to give testimony. Carpenter testified that Cunningham and Baskin both worked on the "raw 2 line" and that the women worked

side-by-side—"nine or ten inches" apart from one another. Twenty-five to thirty-five persons worked on this particular assembly line. Carpenter also testified that the women would occasionally not work side-by-side if another employee was absent from work and a spot in another location needed to be filled, but that the women typically worked next to one another. Carpenter observed the women working every day and based her testimony on her personal observations. Flowers's counsel asked Carpenter if there was documentation supporting the location of Cunningham and Basking on the assembly line, and Carpenter stated that she could provide documentation supporting her testimony. Apparently, Carpenter did not provide the documentation.

¶254. At first glance, the conflicting testimony of Cunningham and Carpenter tends to provide a race-neutral basis for the State's challenge. *See* *1167 *Manning*, 735 So.2d at 340. When considering the voir dire process as a whole, however, the State's investigation of Cunningham is suspect. As discussed above, the State accepted Pamela Chesteen as a juror even though she stated that several members of the Flowers family were customers at the bank where she worked. There is no evidence in the record that the State further investigated the relationship between Chesteen and the Flowers family, and the State did not voir dire Chesteen on this subject. The absence of voir dire and investigation for Chesteen compared to the thorough investigation for Cunningham is problematic and tends to evidence disparate treatment. *See Miller-El*, 125 S.Ct. at 2328 (failing to conduct meaningful voir dire on subject with which State is allegedly concerned suggests that "explanation is a sham and a pretext for discrimination"); *see also Flowers III*, 947 So.2d at 924 ("Failure to voir dire as to the characteristic cited for the strike is also an indicator of pretext.").

*Cunningham's Wavering Views on the Death Penalty*

¶255. The State cited Cunningham's wavering views on the death penalty as another basis for its challenge. On her juror questionnaire, although she stated that she had "no opinion" on the death penalty, Cunningham stated that she would not consider the death penalty under any circumstances. During voir dire by the trial court, Cunningham initially stated that she could not consider the death penalty as a punishment, but she then stated that she "might" consider it:

Q: ... [w]hat's your view on even considering the death penalty?

A: I would not.

...

Q: Are—are you saying you would not consider it?

A: No, sir.

Q: Even if the law allowed it and the facts justified it, you just could not even consider it?

A: No, sir.

...

Q: So—but again, just tell me again what your feelings are on the death penalty.

A: I don't believe in the death penalty.

Q: And would there be a possible—could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's—in your own mind, you might could—are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a—you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility—that as a sentencing possibility, because you and your fellow jurors will decide the sentence, but I just want to know if you could even consider that as a possible sentence?

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).[2]

Then during voir dire by the State, Cunningham returned to her initial position of not being able to consider the death penalty:

*1168 Q: All right. As far as the death penalty—and I want to make sure I understand what you're saying—if the law authorized the death penalty in this case and you found that the facts of the case that came from the stand justified it, could you, in fact, vote for the death penalty?

A: I don't think so.

...

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?

A: I don't think so.

Q: You don't think so.

A: That I could.

When questioned by defense counsel, Cunningham then stated that she could consider both punishments:

Q: ... And what you're required to do is just consider both, then decide which way you want to vote. Do you understand now?

A: Yes, sir.

Q: And that's your decision. And with that being the case, can you consider both options, then vote your conscience?

A: Yes.

¶ 256. This Court has recognized that a juror's views on the death penalty may provide a race-neutral basis for a peremptory challenge. *See* *Batiste v. State*, 121 So.3d 808, 848 (Miss. 2013); *Flowers III*, 947 So.2d at 920–21. In *Flowers III*, this Court found that the striking of an African American who had "virtually indistinguishable" views on the death penalty as compared to white jurors who were not struck raised an inference of discrimination, although, standing alone, it did not warrant the finding of a *Batson* violation. *Flowers III*, 947 So.2d at 921. In today's case, there are no white jurors who survived for-cause challenges whose views on the death penalty were comparable to Cunningham's. As such, it cannot be said that this basis was pretext.

¶ 257. This race-neutral basis, however, does not erase the prosecutor's highly suspect investigation of Cunningham's working relationship with Flowers's sister. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller–El*, 545 U.S. at 239–40, 125 S.Ct. 2317. No evidence in the record provides a basis for the in-depth investigation. Likewise, nothing in the record evidences that a similar investigation was performed for all other jurors. With this suspect record, the prosecution's unusual investigation of Cunningham must be seen for what it is worth—a questionable search for a race neutral basis, indicating that striking Cunningham was "motivated in substantial part by discriminatory intent." *See* *Foster*, 136 S.Ct. at 1754 (internal quotations omitted).

5. Edith Burnside

¶ 258. The State provided the following reasons in support of its peremptory strike of Burnside: (1) she knew Flowers and members of his family; (2) she was sued by Tardy's Furniture; and (3) she provided inconsistent statements regarding her views on the death penalty.

*Burnside's Litigation with Tardy's*

¶ 259. During voir dire, the trial court asked the entire venire if anyone had been sued by Tardy's, and Burnside responded that she had been sued by the store. Later, Burnside explained that she was able to pay off the amount that she owed the store and that the litigation stemmed from a misunderstanding about her account after the murders occurred. During the *Batson* hearing, the State represented that Burnside had a garnishment issued against her. The prosecutor stated: "She also was sued by Tardy Furniture, and a garnishment was issued against her. She tried to *1169 deny that and said that she just settled with them when she came back but she was, in fact, sued by them." The State's description of the litigation and Burnside's testimony regarding the same is not completely supported by the record. In response to the trial court's first inquiry during group voir dire, Burnside stated: "I had an account there, but I was not sued by Ms. Bertha. It was later on when it was took over by Mr. Frank and Roxanne." Burnside then confirmed that she was sued by Tardy's.

¶ 260. Then, during individual voir dire, Burnside further explained the suit:

A: .... Let me explain that. I worked for Ms. Bertha. She hired me to work for Mr. Tardy before she was married to him the first time. I was caring for Ms. Lena Tardy. That's how I met Ms. Bertha. So when me and my husband was going through a divorce, she let me have some furniture. And she said she was going to note it on the book. Sometimes, I cleaned up for her and I paid for it and we just have, like, a little understanding about it. Okay. When she got killed, it was still on the book. And then her son-in-law—when I came back from Nevada, then that's when I had to pay for it. I don't remember when it was.

Q: So there was a dispute between you and her son-in-law?

A: No. It wasn't a dispute. He just—

Q: Well, did you agree that you owed it?

A: Yes. We had no falling out about it. I had the funds, and I agreed I owed it. When I went to Nevada, I guess it was just a space where I owed him. When I came back here and went to work, I paid him for it. We never had a misunderstanding about it.

Q: If it wasn't no misunderstanding, why did it have to go to court?

A: I'm not quite sure about that. I remember them bringing the papers after I come back here to go to work. Maybe he found out I was back or what. But then I went down to the store—that's when they had moved the store over to where the other building was—and I talked to him about when I paid it. We never had a falling out about it.

Q: But you did have to be sued over it?

A: Yes. I can't remember the—

Q: And there was a judgment against you?

A: Yes. But it was no falling-out about it.

Q: Is there anything about that, that would cause you any difficulty in that case?

A: No. Because he is a distributor for something for one of our salesman at Super Value where I work, and he come in every Thursday, and the lady make an order so I see him like on a weekly basis. But, you know, sometimes, I speak if it's—because she see him like over in her office, so no, it's nothing about that would make me have no—.

¶ 261. Similar to the State's characterization of Wright's litigation with Tardy's discussed above, the State's representation that Burnside's wages were garnished and that Burnside "denied" this is unsupported by the record in today's case. This incorrect description of the litigation between Burnside and Tardy's is suspect. *See Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519) ("Lack of support in the record for the reason given for a peremptory strike has been identified as an indicator of pretext."); *Foster*, 136 S.Ct. at 1754 (misrepresentations of the record are evidence of discriminatory intent).

*1170 *Burnside's Relationships with Flowers and His Family*

¶ 262. The State also cited Burnside's relationships with Flowers and his family as a basis for its challenge. Burnside stated during voir dire that she used to live close to the Flowers family. Flowers and his sister, Prisilla, used to visit Burnside's home. Further, Flowers was friends with Burnside's sons and used to play football with them. Burnside stated that these relationships would not affect her ability to serve as a juror.

¶ 263. No white venire members had comparable—or even close to comparable—relationships with Flowers and his family. This Court has recognized that a juror's relationships with the defendant's family may provide a race-neutral reason for a peremptory challenge. *See Manning*, 735 So.2d at 340. And although Burnside stated that her connections to the Flowers family would not affect her when serving as a juror, this basis—standing alone—seems to not be pretext. As mentioned above, however, this race neutral basis does not negate the questionable characterization of Burnside's litigation with Tardy's. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller-El*, 545 U.S. at 239–40, 125 S.Ct. 2317.

*Burnside's Statements Regarding the Death Penalty and Her Ability to Judge Others*

¶ 264. The State's final reasons for striking Burnside were her statements relating to whether she could judge another person and impose the death penalty. Burnside testified as follows during individual voir dire:

Q: .... And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?

A: That I don't think I could do. I don't know if I could do that. ... I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

Q: And can you explain further your views on that?

A: I've just never been put in that predicament. I've always just don't know if I could do that. It's just the best way

I can explain it. I just don't think I could do that.

Q: Again, let me explain. You're not committing to do it or not to do it. You're just—we just need to know if that's something that would be in your mind where you could think about it and you could consider the possibility of it.

A: I could think about it and consider it. That's all I could say.

Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?

A: If I was on there, yeah, I guess I'd have to.

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Q: Also, if he did not receive that death sentence—if he was convicted and the jury did not impose the death sentence, ... [he] would receive the sentence of life without parole. So is that a sentencing option that you could consider, also?

A: Yes, I could consider that.

Q: And so you would consider and have an open mind as to both sentencing options then; is that correct?

A: Yes, sir.

Although Burnside eventually stated that she would consider both sentencing options, she later stated in voir dire that her *1171 reservations about judging another person would affect her ability to serve as a juror:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But then when they come back and say could I be fair. My thing is I prefer not to judge anyone. But no, I will be fair.

Q: All right. Who will you be fair to?

A: I will be fair to whoever evidence is presented. I will be fair. Because I would want somebody to be fair to me or my children or my family. That the only way I can explain it.

...

Q: So you have changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in the case; is that right?

A: It could, possibly, yes, sir.

Flowers's counsel then rehabilitated Burnside:

Q: Ms. Burnside, if you got picked on the jury, you would be fair to both sides, wouldn't you?

A: Yes, sir.

Q: And despite the fact that you don't like to judge, if you got picked you would, in fact, judge and be fair to both sides; is that correct?

A: Yes, sir, that is correct.

¶ 265. While a juror's views on the death penalty and hesitation about serving as a juror are race neutral reasons for peremptory challenges, the State rehabilitated Burnside and she ultimately stated that she could consider either punishment and could be fair to either side. *See Batiste*, 121 So.3d at 848; *Hughes*, 90 So.3d at 626; *Flowers III*, 947 So.2d at 920–21. As such, this basis is somewhat suspect.

D. Jury Selection Conclusion

¶ 266. While the Court has focused on the interests of Flowers in having a jury not tainted by racial bias, it has ignored the right of prospective jurors not to be subjected to racial bias. Beyond question, the right to a jury selection process

free from the taint of racial discrimination belongs both to the parties and to the prospective jurors. *See Powers v. Ohio*, 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (Courts are "under an affirmative duty to enforce the ... policies embodied in [the] prohibition" on the discrimination in the selection of jurors.). When the trial court and this Court, in robotic fashion, merely say that the prosecution gave facially race-neutral reasons, which were not rebutted by the defense, both completely disregard the constitutional right of prospective jurors to be free from a racially discriminatory selection process.

¶ 267. No attorneys are present in the courtroom to protect the constitutional rights of perspective jurors. Thus, of necessity, that responsibility must be undertaken by the trial courts. The honest exercise of that responsibility demands that the trial court look beyond the mere recitation of the words "race neutral." In this case, the trial court completely ignored and failed in that responsibility.

*1172 III. *Batson* Conclusion

¶ 268. As noted previously, this case has been twice reversed by this Court for some of the same issues presented to the Court today. In the retrial of a case under these circumstances, where the same issues are confronted, the trial court is obligated to look beyond the surface. The United States Supreme Court's decision in *Foster* affirms this principle. The trial court failed in that obligation.

¶ 269. Because of that failure, I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination. For these reasons, I would reverse and remand for a new trial.

IV. Additional Errors

¶ 270. While the United State Supreme Court focused its remand on the *Batson* violation, and while I find the *Batson* violation dispositive, I continue to believe that other errors occurred at trial that also warrant reversal. Those errors were memorialized in Presiding Justice Dickinson's dissent in the original appeal on this matter. *Flowers v. State*, 158 So.3d 1009, 1076–83 (Miss. 2014) (Dickinson, P.J., dissenting). The circuit judge erred by refusing to allow the accused to defend the charges by calling a qualified expert to provide perfectly admissible expert opinions, and by instructing the jury on an aggravating factor for which the State provided no evidence. I reiterate those errors here, with credit to then-Justice Dickinson. *See id.* (Dickinson, P.J., dissenting).

A. Dr. Neuschatz should have been allowed to testify.

¶ 271. The trial judge categorically prohibited Flowers's expert, Dr. Jeffrey Neuschatz, from providing expert testimony on eyewitness identification. It was not that the trial judge disagreed with the evidence in Dr. Neuschatz's expert affidavit—he ignored it. The trial judge felt that any helpful information that could have been provided by the expert could just as easily have been developed through cross-examination. But the information the expert would have provided could never be developed on cross examination, because the witnesses would not know they had made misidentifications.

¶ 272. This Court reviews a trial court's ruling on the admissibility of evidence under a deferential abuse of discretion standard. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003) (internal citations omitted). Under Rule 702, an expert's testimony must satisfy a two-part test. *Id.* at 35. "First, the witness must be qualified by virtue of his or her knowledge, skill, experience[,] or education. Second, the witness's scientific, technical[,] or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue." *Id.*

¶ 273. The trial judge is to act as a gatekeeper and may look to "a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony." *Id.* at 36 (internal citations omitted). The five factors referenced in *Daubert*[10] look at whether: (1) the theory or technique can be and has been tested; (2) the theory has been subjected to peer review and publication; (3) there is a high known or potential rate of error; (4) there are standards controlling the technique's operation; and (5) the theory or technique enjoys general acceptance *1173 within a relevant scientific community. *Id.* (internal citations omitted). The presence or absence of any one of these factors is not dispositive.

¶ 274. The issue of allowing experts to testify about the reliability of eyewitness identification is not new. A majority of state jurisdictions allow eyewitness identification experts to testify, provided they are properly qualified and their opinions satisfy reliability concerns, such as those set forth in *Daubert*. For instance, the Tennessee Supreme Court—evaluating factors similar to those mentioned in *Daubert*—reversed its prior position seven years ago and now allows properly qualified eyewitness experts to testify, finding that such testimony can be helpful in the jury's evaluation of an eyewitness's identification. *State v. Copeland*, 226 S.W.3d 287, 302–304 (Tenn. 2007). And the vast majority of states and the District of Columbia either give trial courts discretion to allow eyewitness identification expert testimony, or require the admission of such testimony.[11]

¶ 275. In this case, the trial judge first found that the trier of fact did not need *1174 Dr. Neuschatz's testimony. He stated: "Given the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witnesses identification would assist the jury in the least bit in this case." This conclusion was demonstrably incorrect. The trial judge provided no analysis of how cross-examination of the witnesses could develop the opinions provided by Dr. Neuschatz, or how the witnesses themselves could provide expert testimony. The eyewitnesses certainly could provide the facts, such as distance, lighting, length of time, etc. But Dr. Neuschatz was not presented to testify to the facts alone. His role was to begin with the facts provided by the eyewitnesses, and then provide expert testimony as to the difficulties and reliability associated with identification. The eyewitnesses themselves certainly could not provide the testimony expected from Dr. Neuschatz.

¶ 276. Nor could cross-examination provide an adequate substitute for Dr. Neuschatz's testimony. A skillful attorney may utilize cross-examination to expose contradictions in a witness's testimony. But no attorney—of even the greatest skill—can cross-examine a witness in such a way as to expose that the witness did not see what the witness actually believes he saw. And that is exactly the purpose of expert eyewitness identification testimony. Dr. Neuschatz—if allowed to testify—would have explained scientific principles affecting the accuracy of a witness's perception of what he saw.

¶ 277. The trial judge's entire *Daubert* analysis was as follows:

> Further, though, I think aside from the fact that I do not think this would assist the trier of fact, I do not think all the *Daubert* principles have been shown to the Court to apply to this testimony. The defense has not offered to this Court this idea that the theories the defense would testify to or the area of expertise proffered are generally accepted. I do not know whether the testimony has a potential or known high rate of error. I do not have anything about that. I do not know anything about the principles and methods used to come to conclusions. And basically, the witness did not apply the principles and methods to the facts of this case. He made broad generalizations in the document that was submitted, but he did not specifically apply those principles and methods to the facts of this case. So for all these reasons, I do not think that this witness testimony would be appropriate, and I am going to deny the testimony of this witness.

The following is a detailed analysis of each sentence of the trial judge's *Daubert* analysis, and it demonstrates that the trial judge abused his discretion in refusing to allow Dr. Neuschatz to testify as an expert.

*"I do not think all the Daubert principles have been shown to the Court to apply to this testimony."*

¶ 278. This statement suggests the trial court erroneously believed the defendant had a burden to show that "all the *Daubert* factors" applied. Clearly, this is not the case.

*"The defense has not offered to this Court this idea that the theories the defense would testify to or the area of expertise proffered are generally accepted."*

¶ 279. This conclusion was incorrect. Dr. Neuschatz cited thirty-three studies in his affidavit, each of which indicated general acceptance in the field of psychology. The State offered no evidence in rebuttal of Dr. *1175 Neuschatz's affidavit on this point.[12]

¶ 280. The majority's only reason for agreeing with the trial judge on this point is that Dr. Neuschatz did not attach each article to his affidavit. But under our Rules of Evidence, experts are not required to attach the basis of their opinions to their affidavits. Instead, they are allowed to rely on studies that they do not provide to the court, unless requested by the court. Rule 705 provides

> The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Miss. R. Evid. 705.

¶ 281. In this case, neither the trial judge nor the State requested production of the underlying data or the articles upon which Dr. Neuschatz relied. It was clear error for the trial judge to reject Dr. Neuschatz's affidavit merely because the articles were not attached. And the majority compounds the error by requiring the expert in this case to do something other experts are not required to do,[13] and something this very Court's rules specifically do not require.

¶ 282. In *Watts v. Radiator Specialty Company*, this Court considered whether an expert's opinions were actually supported by the case-studies he cited. *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 146–48 (Miss. 2008). The expert in that case did not provide the studies to the court. *Id.* at 147 n.7. Though this Court found that the trial court properly excluded the expert's testimony because the studies did not support his conclusion, the Court never questioned his failure to provide those studies. *Id.*

*"I do not know whether the testimony has a potential or known high rate of error. I do not have anything about that."*

¶ 283. Again, on this point, the trial judge was incorrect. In his affidavit, Dr. Neuschatz discussed extensive testing that produced precise error rates. For instance, in discussing the factor of exposure time, Dr. Neuschatz stated:

> Exposure duration had a significant impact on identification accuracy. Ninety-five percent of the young adults and 85% of the older adults made correct identifications from the robber-present photo arrays when the robber was exposed for 45 seconds, but only 29% of the young adults and 35% of the older adults made correct identifications when the robber was exposed for 12 seconds.

*1176 ¶ 284. In discussing the appearance change disguise factor, he stated: "The average performance levels across the six studies, which involved over 1,300 eyewitness identifications, was 57% correct when uncovered and versus 44% when a hat was worn."

¶ 285. In discussing cross-race identification, Dr. Neuschatz stated:

> The reliability of the ORB [own-race bias] was examined by Meissner and Brigham (2001) who meta-analyzed the results of 31 separate studies involving 91 separate experimental tests of own versus same-race identifications. The studies included over 5,000 participants. Across all studies, eyewitnesses were 1.4 times more likely to correctly identify members of their own race than members of other races, and they were 1.56 times more likely to falsely identify members of other races than members of their own race.

¶ 286. These and other studies cited in the affidavit speak not only to error rates but also to the reliability of Dr. Neuschatz's opinions.

*"I do not know anything about the principles and methods used to come to conclusions."*

¶ 287. Here again, the trial judge was incorrect. The studies cited above, and the balance of Dr. Neuschatz's affidavit are replete with descriptions of the methods and principles used in the numerous studies.

¶ 288. Dr. Neuschatz's affidavit contained detailed information about studies on: (1) how memory works; (2) effect of exposure time on reliability of memory; (3) effect of appearance changes and disguises on identification; (4) the phenomenon of unconscious transference where one situation is confused with another; (5) problems with cross-racial identifications; (6) problems with post identification feedback; and (7) problems with suggestive line-up procedures.

*"And basically, the witness did not apply the principles and methods to the facts of this case. He made broad generalizations in the document that was submitted, but he did not specifically apply those principles and methods to the facts of this case."*

¶ 289. Again, the trial judge was incorrect. Dr. Neuschatz indeed applied the principles and methods in his field of expertise to the facts in the Flowers case. For instance, he analyzed in detail the effect of the police's line-up identification. Also, he addressed issues involving Porky Collins's identification, including problems with cross-racial identifications.

*Refusing to allow Dr. Neuschatz to testify was not harmless error.*

¶ 290. Dr. Neuschatz's testimony would have provided the jury a fair basis upon which to judge the accuracy of Collins's identification. I also cannot accept the majority's conclusion that "Collins's identification was far from the only evidence of guilt in the instant case, and it cannot be label 'critical.' "

¶ 291. It is true that the State had other witnesses, but none provided the powerful eyewitness testimony that Collins provided. He is the only witness who placed Flowers at the scene of the murders shortly before they were committed. None of the witnesses was more critical to the State's case, and none was more important for the defense to attack.

¶ 292. The State offered *nothing* in rebuttal of Dr. Neuschatz's opinions: no experts, articles, studies, or evidence of any

kind that tended to refute his opinions and methodology. Accordingly, Dr. Neuschatz should have been allowed to testify in this case.

*1177 B. The trial judge should have denied the State's requested instruction on the commission of a capital crime to avoid arrest aggravator.

¶ 293. When Flowers's case proceeded to the sentencing phase, the trial judge instructed the jury to consider three potential aggravating factors:

1. The Defendant knowingly created a great risk of death to many persons.

2. The capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain.

3. The capital offense was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody.

The jury found each aggravating factor and sentenced Flowers to death. Because the trial judge erred when he instructed the jury to consider the third aggravating factor, I would reverse Flowers's death sentence and remand for resentencing even if this Court affirmed his conviction.

¶ 294. It is elementary that the State bears the burden to prove the defendant's guilt of a charged offense beyond a reasonable doubt. *Henley v. State*, 136 So.3d 413, 415–16 (Miss. 2014). Likewise, our law places upon the State the burden in a capital murder sentencing proceeding to prove the existence of each aggravating factor beyond a reasonable doubt. *Holland v. State*, 587 So.2d 848, 874 (Miss. 1991) (citing *Nixon v. State*, 533 So.2d 1078, 1099 (Miss. 1987), *overruled on other grounds by Wharton v. State*, 734 So.2d 985, 991 (Miss. 1998)); *see also Keller v. State*, 138 So.3d 817, 867–68 (Miss. 2014). Only when the State satisfies its burden may the jury weigh a particular aggravating factor in favor of a death sentence. *Keller*, 138 So.3d at 867–68.

¶ 295. The Majority relies on this Court's repeated statement that an instruction should be granted on this aggravating factor if the jury may draw an inference from the evidence that avoiding arrest was "a substantial reason for the killing." *Id.* at 868 (quoting *Gillett v. State*, 56 So.3d 469, 505–06 (Miss. 2010) (quoting *Leatherwood v. State*, 435 So.2d 645, 651 (Miss. 1983))); *see also Wiley v. State*, 750 So.2d 1193, 1206 (Miss. 1999); *Woodward v. State*, 726 So.2d 524, 540 (Miss. 1997); *Foster v. State*, 687 So.2d 1124, 1140 (Miss. 1996); *Taylor v. State*, 672 So.2d 1246, 1275 (Miss. 1996); *Walker v. State*, 671 So.2d 581, 611 (Miss. 1995); *Carr v. State*, 655 So.2d 824, 853–54 (Miss. 1995); *Chase v. State*, 645 So.2d 829, 858 (Miss. 1994); *Hansen v. State*, 592 So.2d 114, 153 (Miss. 1991); *Lanier v. State*, 533 So.2d 473, 490 (Miss. 1988). But that standard—stated in that way with nothing more—cannot be the law. Saying jurors may draw an inference is not enough, unless the inference is so strong that, standing alone, the inference is sufficient for a finding beyond a reasonable doubt. The inference in this case clearly does not fall into that category.

¶ 296. The Majority says a reasonable juror could infer that Flowers killed one of the victims to prevent identification and avoid arrest. While a reasonable juror might very well find that to be a possibility, it would be no more than a guess. And no reasonable juror could make that finding beyond a reasonable doubt. Judges should submit issues to juries through instructions *only* when a reasonable juror could find the beyond a reasonable doubt burden of proof satisfied on that issue. *Henley*, 136 So.3d at 415–16 (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State*, 460 So.2d 778, 781 (Miss. 1984)) (a directed verdict should be granted if no reasonable juror could find the

defendant guilty beyond a reasonable *1178 doubt)); *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985) (a lesser offense instruction should be granted unless no reasonable juror could find that the defendant committed the lesser offense).

¶ 297. Stated another way, jurors certainly are free to draw reasonable inferences from the facts. But a juror's ability to draw a reasonable inference is not the same as a reasonable juror's ability to find that fact beyond a reasonable doubt. For instance, one may draw a reasonable inference that a person who usually goes to lunch from 12:00 to 1:00 p.m. is at lunch on a particular day at 12:30 p.m. But that does not mean one may reach that conclusion beyond a reasonable doubt.

¶ 298. So a trial judge should grant a State's request to instruct the jury on this aggravating factor only where the State has presented evidence from which a reasonable juror could find beyond a reasonable doubt that "a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover their tracks' so as to avoid apprehension and eventual arrest by authorities." *Keller*, 138 So.3d at 867–68 (quoting *Gillett*, 56 So.3d at 505–06 (quoting *Leatherwood*, 435 So.2d at 651)). And any case that categorically establishes inferences as sufficient to satisfy the beyond-a-reasonable-doubt standard should be overruled.

¶ 299. The State presented insufficient evidence to meet its burden. The most that may be said in this case is that the jury could speculate that Flowers committed one of the murders to avoid arrest. There was no evidence that he did. In fact, the State argued in the guilt phase that Flowers committed the murders for different purposes: revenge and anger over being fired as well as to effectuate the robbery. From its opening statement, the State's theory of the case was that Flowers possessed a motive to commit the murders because he had been fired by Tardy's. This motive—a revenge killing—is at odds with a conclusion that he killed out of a necessity to avoid arrest. No evidence was presented that Flowers expressed an intent to kill to avoid arrest.

¶ 300. The Majority finds that this aggravating factor instruction is supported by two facts: Flowers knew his victims and Flowers disposed of evidence after the killings. The second can be disposed of easily because it bears no logical connection to the question at hand. Regardless of the reason someone commits murder, that person usually has an incentive to dispose of the evidence. Said differently, if Flowers killed his victims out of pure anger, he would have an incentive to cover up the killing by disposing of evidence. The same could be said if Flowers killed because the victims resisted the robbery. Showing that Flowers disposed of evidence after the killing makes it no more reasonable to conclude that he killed to avoid arrest.

¶ 301. Likewise, the Majority's reliance on the fact that Flowers knew his victims is misplaced. First, by the Majority's own statement, this rationale applies to one victim. The majority states:

> The State's theory was that Flowers intended to kill Bertha Tardy because she fired him and withheld his pay and, in the process of doing so, he shot and killed the others. Flowers knew Carmen Rigby from working at the store, but there is no evidence that he knew Robert Johnson or Derrick Stewart, as the day of the murders was their first day to work at the store.

This statement acknowledges that Flowers killed Tardy—not to avoid arrest—but for revenge. The Majority admits that Flowers did not know Johnson or Stewart. So at best, the Majority's reliance on this evidence relates to Rigby alone. But even there it cannot provide sufficient evidence *1179 to grant the instruction. It is simply inaccurate to say that a reasonable juror could conclude beyond a reasonable doubt that Flowers killed Rigby to avoid arrest, simply because they had worked together.

¶ 302. True, this Court has supported an instruction on this aggravating factor in the past based solely on the fact that the victim knew the defendant and could identify him. *Wiley*, 750 So.2d at 1206. But if we are to enforce the burden of proof required of the State, this was error. Allowing a jury to consider an aggravating factor based on nothing more than pure speculation cannot reach the level of proof beyond a reasonable doubt. Because the State presented insufficient evidence from which a reasonable juror could find this aggravating factor beyond a reasonable doubt, I would reverse Flowers's sentence of death and remand for a new sentencing hearing.

KITCHENS, P.J., JOINS THIS OPINION. WALLER, C.J., JOINS IN PART WITH OPINION.

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

*Timothy Nelson Evans v. State*, 226 So.3d 1 (Miss. 2017).

*James Cobb Hutto III v. State*, 227 So.3d 963, 2014-DP-00177-SCT, 2017 WL 2001157 (Miss. May 11, 2017).

*David Cox v. State*, 183 So.3d 36 (Miss. 2015).

*David Dickerson v. State*, 175 So.3d 8 (Miss. 2015).

*Timothy Robert Ronk v. State*, 172 So.3d 1112 (Miss. 2015).

*Curtis Giovanni Flowers v. State*, 158 So.3d 1009 (Miss. 2014). •following remand.

*Caleb Corrothers v. State*, 148 So.3d 278 (Miss. 2014), *leave to seek PCR granted in part and denied in part* (Feb. 2, 2017), *rehearing denied* (May 11, 2017).

*Jason Lee Keller v. State*, 138 So.3d 817 (Miss. 2014), *leave to seek PCR granted in part and denied in part* (May 25, 2017).

*Leslie Galloway III v. State*, 122 So.3d 614 (Miss. 2013).

*Bobby Batiste v. State*, 121 So.3d 808 (Miss. 2013), *granted leave to seek PCR* (Jan. 21, 2016).

*Roger Lee Gillett v. State*, 56 So.3d 469 (Miss. 2010).

*Moffett v. State*, 49 So.3d 1073 (Miss. 2010).

*Pitchford v. State*, 45 So.3d 216 (Miss. 2010).

*Goff v. State*, 14 So.3d 625 (Miss. 2009).

*Wilson v. State*, 21 So.3d 572 (Miss. 2009).

*Chamberlin v. State*, 989 So.2d 320 (Miss. 2008).

*Loden v. State*, 971 So.2d 548 (Miss. 2007).

*King v. State*, 960 So.2d 413 (Miss. 2007).

*Bennett v. State*, 933 So.2d 930 (Miss. 2006).

*Havard v. State*, 928 So.2d 771 (Miss. 2006).

*Spicer v. State*, 921 So.2d 292 (Miss. 2006).

*Hodges v. State*, 912 So.2d 730 (Miss. 2005).

*Walker v. State*, 913 So.2d 198 (Miss. 2005).

*Le v. State*, 913 So.2d 913 (Miss. 2005), *granted leave to seek second PCR*, 2013-DR-00327-SCT (Feb. 23, 2016).

*1180 *Brown v. State*, 890 So.2d 901 (Miss. 2004).

*Powers v. State*, 883 So.2d 20 (Miss. 2004)

*Branch v. State*, 882 So.2d 36 (Miss. 2004).

*Scott v. State*, 878 So.2d 933 (Miss. 2004).

*Lynch v. State*, 877 So.2d 1254 (Miss. 2004).

*Dycus v. State*, 875 So.2d 140 (Miss. 2004).

*Byrom v. State*, 863 So.2d 836 (Miss. 2003).

*Howell v. State*, 860 So.2d 704 (Miss. 2003).

*Howard v. State*, 853 So.2d 781 (Miss. 2003).

*Walker v. State*, 815 So.2d 1209 (Miss. 2002). *following remand.

*Bishop v. State*, 812 So.2d 934 (Miss. 2002).

*Stevens v. State*, 806 So.2d 1031 (Miss. 2002).

*Grayson v. State*, 806 So.2d 241 (Miss. 2002).

*Knox v. State*, 805 So.2d 527 (Miss. 2002).

*Simmons v. State*, 805 So.2d 452 (Miss. 2002).

*Berry v. State*, 802 So.2d 1033 (Miss. 2001).

*Snow v. State*, 800 So.2d 472 (Miss. 2001).

*Mitchell v. State*, 792 So.2d 192 (Miss. 2001).

*Puckett v. State*, 788 So.2d 752 (Miss. 2001). * following remand.

*Goodin v. State*, 787 So.2d 639 (Miss. 2001).

*Jordan v. State*, 786 So.2d 987 (Miss. 2001).

*Manning v. State*, 765 So.2d 516 (Miss. 2000). *following remand.

*Eskridge v. State*, 765 So.2d 508 (Miss. 2000).

*McGilberry v. State*, 741 So.2d 894 (Miss. 1999).

*Puckett v. State*, 737 So.2d 322 (Miss. 1999). *remanded for *Batson* hearing.

*Manning v. State*, 735 So.2d 323 (Miss. 1999). *remanded for *Batson* hearing.

*Hughes v. State*, 735 So.2d 238 (Miss. 1999).

*Turner v. State*, 732 So.2d 937 (Miss. 1999).

*Smith v. State*, 729 So.2d 1191 (Miss. 1998).

*Burns v. State*, 729 So.2d 203 (Miss. 1998).

*Jordan v. State*, 728 So.2d 1088 (Miss. 1998).

*Gray v. State*, 728 So.2d 36 (Miss. 1998).

*Manning v. State*, 726 So.2d 1152 (Miss. 1998).

*Woodward v. State*, 726 So.2d 524 (Miss. 1997).

*Bell v. State*, 725 So.2d 836 (Miss. 1998), *post-conviction relief granted in part and denied in part*, 725 So.2d 836 (Miss. 1998).

*Evans v. State*, 725 So.2d 613 (Miss. 1997).

*Brewer v. State*, 725 So.2d 106 (Miss. 1998).

*Crawford v. State*, 716 So.2d 1028 (Miss. 1998).

*Doss v. State*, 709 So.2d 369 (Miss. 1996).

*Underwood v. State*, 708 So.2d 18 (Miss. 1998).

*1181 *Holland v. State*, 705 So.2d 307 (Miss. 1997).

*Wells v. State*, 698 So.2d 497 (Miss. 1997).

*Wilcher v. State*, 697 So.2d 1087 (Miss. 1997).

*Wiley v. State*, 691 So.2d 959 (Miss. 1997).

*Brown v. State*, 690 So.2d 276 (Miss. 1996).

*Simon v. State*, 688 So.2d 791 (Miss.1997).

*Jackson v. State*, 684 So.2d 1213 (Miss. 1996).

*Williams v. State*, 684 So.2d 1179 (Miss. 1996).

*Davis v. State*, 684 So.2d 643 (Miss. 1996).

*Taylor v. State*, 682 So.2d 359 (Miss. 1996).

*Brown v. State*, 682 So.2d 340 (Miss. 1996).

*Blue v. State*, 674 So.2d 1184 (Miss. 1996).

*Holly v. State*, 671 So.2d 32 (Miss. 1996).

*Walker v. State*, 671 So.2d 581 (Miss. 1995).

*Russell v. State*, 670 So.2d 816 (Miss. 1995).

*Ballenger v. State*, 667 So.2d 1242 (Miss. 1995).

*Davis v. State*, 660 So.2d 1228 (Miss. 1995).

*Carr v. State*, 655 So.2d 824 (Miss. 1995).

*Mack v. State*, 650 So.2d 1289 (Miss. 1994).

*Chase v. State*, 645 So.2d 829 (Miss. 1994).

*Foster v. State*, 639 So.2d 1263 (Miss. 1994).

*Conner v. State*, 632 So.2d 1239 (Miss. 1993).

*Hansen v. State*, 592 So.2d 114 (Miss. 1991).

*Shell v. State*, 554 So.2d 887 (Miss. 1989); *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding; *Shell v. State*, 595 So.2d 1323 (Miss. 1992) remanding for new sentencing hearing.

*Davis v. State*, 551 So.2d 165 (Miss. 1989).

*Minnick v. State*, 551 So.2d 77 (Miss. 1989).

*Pinkney v. State*, 538 So.2d 329 (Miss. 1989); *Pinkney v. Mississippi*, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding; *Pinkney v. State*, 602 So.2d 1177 (Miss. 1992) remanding for new sentencing hearing.

*Clemons v. State*, 535 So.2d 1354 (Miss. 1988); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) vacating and remanding; *Clemons v. State*, 593 So.2d 1004 (Miss. 1992) remanding for new sentencing hearing.

*Woodward v. State*, 533 So.2d 418 (Miss. 1988).

*Nixon v. State*, 533 So.2d 1078 (Miss. 1987).

*Cole v. State*, 525 So.2d 365 (Miss. 1987).

*Lockett v. State*, 517 So.2d 1346 (Miss. 1987).

•1182 *Lockett v. State*, 517 So.2d 1317 (Miss. 1987).

*Faraga v. State*, 514 So.2d 295 (Miss. 1987).

*Jones v. State*, 517 So.2d 1295 (Miss. 1987); *Jones v. Mississippi*, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925

(1988) vacating and remanding; *Jones v. State*, 602 So.2d 1170 (Miss. 1992) remanding for new sentencing hearing.

*Wiley v. State*, 484 So.2d 339 (Miss. 1986).

*Johnson v. State*, 477 So.2d 196 (Miss. 1985).

*Gray v. State*, 472 So.2d 409 (Miss. 1985).

*Cabello v. State*, 471 So.2d 332 (Miss. 1985).

*Jordan v. State*, 464 So.2d 475 (Miss. 1985).

*Wilcher v. State*, 455 So.2d 727 (Miss. 1984).

*Billiot v. State*, 454 So.2d 445 (Miss. 1984).

*Stringer v. State*, 454 So.2d 468 (Miss. 1984).

*Dufour v. State*, 453 So.2d 337 (Miss. 1984).

*Neal v. State*, 451 So.2d 743 (Miss. 1984).

*Booker v. State*, 449 So.2d 209 (Miss. 1984).

*Wilcher v. State*, 448 So.2d 927 (Miss. 1984).

*Caldwell v. State*, 443 So.2d 806 (Miss. 1983).

*Irving v. State*, 441 So.2d 846 (Miss. 1983).

*Tokman v. State*, 435 So.2d 664 (Miss. 1983).

*Leatherwood v. State*, 435 So.2d 645 (Miss. 1983).

*Hill v. State*, 432 So.2d 427 (Miss. 1983).

*Pruett v. State*, 431 So.2d 1101 (Miss. 1983).

*Gilliard v. State*, 428 So.2d 576 (Miss. 1983).

*Evans v. State*, 422 So.2d 737 (Miss. 1982).

*King v. State*, 421 So.2d 1009 (Miss. 1982).

*Wheat v. State*, 420 So.2d 229 (Miss. 1982).

*Smith v. State*, 419 So.2d 563 (Miss. 1982).

*Johnson v. State*, 416 So.2d 383 (Miss.1982).

*Edwards v. State*, 413 So.2d 1007 (Miss. 1982).

*Bullock v. State*, 391 So.2d 601 (Miss. 1980).

*Reddix v. State*, 381 So.2d 999 (Miss. 1980).

*Jones v. State*, 381 So.2d 983 (Miss. 1980).

*Culberson v. State*, 379 So.2d 499 (Miss. 1979).

*Gray v. State*, 375 So.2d 994 (Miss. 1979).

*Jordan v. State*, 365 So.2d 1198 (Miss. 1978).

*Voyles v. State*, 362 So.2d 1236 (Miss. 1978).

*Irving v. State*, 361 So.2d 1360 (Miss. 1978).

*Washington v. State*, 361 So.2d 61 (Miss. 1978).

*Bell v. State*, 360 So.2d 1206 (Miss. 1978).

*1183 DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCING PHASE

***Sherwood Brown v. State***, 2017-DR-00206-SCT (Oct. 26, 2017) (order).

***Erik Wayne Hollie v. State***, 174 So.3d 824 (Miss. 2015).

***Manning v. State***, 158 So.3d 302 (Miss. 2015) (reversing denial of post-conviction relief).

***Byrom v. State***, 2014-DR-00230-SCT (April 3, 2014) (order).

***Ross v. State***, 954 So.2d 968 (Miss. 2007).

***Flowers v. State***, 947 So.2d 910 (Miss. 2007).

***Flowers v. State***, 842 So.2d 531 (Miss. 2003).

***Randall v. State***, 806 So.2d 185 (Miss. 2002).

***Flowers v. State***, 773 So.2d 309 (Miss. 2000).

***Edwards v. State***, 737 So.2d 275 (Miss. 1999).

***Smith v. State***, 733 So.2d 793 (Miss. 1999).

***Porter v. State***, 732 So.2d 899 (Miss. 1999).

***Kolberg v. State***, 704 So.2d 1307 (Miss. 1997).

***Snelson v. State***, 704 So.2d 452 (Miss. 1997).

***Fuselier v. State***, 702 So.2d 388 (Miss. 1997).

***Howard v. State***, 701 So.2d 274 (Miss. 1997).

***Lester v. State***, 692 So.2d 755 (Miss. 1997).

*Hunter v. State*, 684 So.2d 625 (Miss. 1996).

*Lanier v. State*, 684 So.2d 93 (Miss. 1996).

*Giles v. State*, 650 So.2d 846 (Miss. 1995).

*Duplantis v. State*, 644 So.2d 1235 (Miss. 1994).

*Harrison v. State*, 635 So.2d 894 (Miss. 1994).

*Butler v. State*, 608 So.2d 314 (Miss. 1992).

*Jenkins v. State*, 607 So.2d 1171 (Miss. 1992).

*Abram v. State*, 606 So.2d 1015 (Miss. 1992).

*Balfour v. State*, 598 So.2d 731 (Miss. 1992).

*Griffin v. State*, 557 So.2d 542 (Miss. 1990).

*Bevill v. State*, 556 So.2d 699 (Miss. 1990).

*West v. State*, 553 So.2d 8 (Miss. 1989).

*Leatherwood v. State*, 548 So.2d 389 (Miss. 1989).

*Mease v. State*, 539 So.2d 1324 (Miss. 1989).

*Houston v. State*, 531 So.2d 598 (Miss. 1988).

*West v. State*, 519 So.2d 418 (Miss. 1988).

*Davis v. State*, 512 So.2d 1291 (Miss. 1987).

*Williamson v. State*, 512 So.2d 868 (Miss. 1987).

*Foster v. State*, 508 So.2d 1111 (Miss. 1987).

*Smith v. State*, 499 So.2d 750 (Miss. 1986).

*West v. State*, 485 So.2d 681 (Miss. 1985).

*Fisher v. State*, 481 So.2d 203 (Miss. 1985).

•1184 *Johnson v. State*, 476 So.2d 1195 (Miss. 1985).

*Fuselier v. State*, 468 So.2d 45 (Miss. 1985).

*West v. State*, 463 So.2d 1048 (Miss. 1985).

*Jones v. State*, 461 So.2d 686 (Miss. 1984).

*Moffett v. State*, 456 So.2d 714 (Miss. 1984).

*Lanier v. State*, 450 So.2d 69 (Miss. 1984).

*Laney v. State*, 421 So.2d 1216 (Miss. 1982).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT

*Bell v. State*, 160 So.3d 188 (Miss. 2015).

*Reddix v. State*, 547 So.2d 792 (Miss. 1989).

*Wheeler v. State*, 536 So.2d 1341 (Miss. 1988).

*White v. State*, 532 So.2d 1207 (Miss. 1988).

*Bullock v. State*, 525 So.2d 764 (Miss. 1987).

*Edwards v. State*, 441 So.2d 84 (Miss. 1983).

*Dycus v. State*, 440 So.2d 246 (Miss. 1983).

*Coleman v. State*, 378 So.2d 640 (Miss. 1979).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY

*Fulgham v. State*, 46 So.3d 315 (Miss. 2010).

*Rubenstein v. State*, 941 So.2d 735 (Miss. 2006).

*King v. State*, 784 So.2d 884 (Miss. 2001).

*Walker v. State*, 740 So.2d 873 (Miss. 1999).

*Watts v. State*, 733 So.2d 214 (Miss. 1999).

*West v. State*, 725 So.2d 872 (Miss. 1998).

*Smith v. State*, 724 So.2d 280 (Miss. 1998).

*Berry v. State*, 703 So.2d 269 (Miss. 1997).

*Booker v. State*, 699 So.2d 132 (Miss. 1997).

*Taylor v. State*, 672 So.2d 1246 (Miss. 1996).

*Shell v. State*, 554 So.2d 887 (Miss. 1989); *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding; *Shell v. State*, 595 So.2d 1323 (Miss. 1992) remanding for new sentencing hearing.

*Pinkney v. State*, 538 So.2d 329 (Miss. 1989); *Pinkney v. Mississippi*, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding; *Pinkney v. State*, 602 So.2d 1177 (Miss. 1992) remanding for new sentencing hearing.

*Clemons v. State, 535 So.2d 1354 (Miss. 1988); Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) vacating and remanding; Clemons v. State, 593 So.2d 1004 (Miss. 1992) remanding for new sentencing hearing.

*Jones v. State, 517 So.2d 1295 (Miss. 1987); Jones v. Mississippi, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) vacating and remanding; Jones v. State, 602 So.2d 1170 (Miss. 1992) remanding for new sentencing hearing.

*1185 Russell v. State, 607 So.2d 1107 (Miss. 1992).

Holland v. State, 587 So.2d 848 (Miss. 1991).

Willie v. State, 585 So.2d 660 (Miss. 1991).

Ladner v. State, 584 So.2d 743 (Miss. 1991).

Mackbee v. State, 575 So.2d 16 (Miss. 1990).

Berry v. State, 575 So.2d 1 (Miss. 1990).

Turner v. State, 573 So.2d 657 (Miss. 1990).

State v. Tokman, 564 So.2d 1339 (Miss. 1990).

Johnson v. State, 547 So.2d 59 (Miss. 1989).

Williams v. State, 544 So.2d 782 (Miss. 1989); *sentence aff'd*, 684 So.2d 1179 (1996).

Lanier v. State, 533 So.2d 473 (Miss. 1988).

Stringer v. State, 500 So.2d 928 (Miss. 1986).

Pinkton v. State, 481 So.2d 306 (Miss. 1985).

Mhoon v. State, 464 So.2d 77 (Miss. 1985).

Cannaday v. State, 455 So.2d 713 (Miss. 1984).

*Wiley v. State*, 449 So.2d 756 (Miss. 1984); resentencing affirmed, *Wiley v. State*, 484 So.2d 339 (Miss. 1986); *cert. denied*, *Wiley v. Mississippi*, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 610 (1988); resentencing ordered, *Wiley v. State*, 635 So.2d 802 (Miss. 1993) following writ of habeas corpus issued pursuant to *Wiley v. Puckett*, 969 F.2d 86, 105–106 (5th Cir. 1992); resentencing affirmed.

*Williams v. State*, 445 So.2d 798 (Miss. 1984). *Case was originally affirmed in this Court but on remand from U. S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

(Revised October 30, 2017.)

**All Citations**

**240 So.3d 1082**

**Footnotes**

1 On November 13, 2014, the Court issued its opinion in *Flowers VI*, affirming Flowers's capital murder convictions and sentence of death, with mandate issuing on April 2, 2015. On May 23, 2016, the Supreme Court issued its opinion in *Foster*.

2 Beneva Henry's testimony from Flowers's 2004 trial was read to the jury. In the nearly fifteen years between the 1996 murders and Flowers's sixth trial, several witnesses had died, moved out of state, or were otherwise no longer available to testify. Their testimony from prior trials had to be read to the jury. Those witnesses were Beneva Henry, Sam Jones, Porky Collins, Stacey Wright, and Billy Glover.

3 Flowers's counsel apparently believed that eyewitness identification expert testimony was not admissible in noncapital cases.

4 In *Carrothers*, Presiding Justice Randolph wrote the following about the admission of Dr. Neuschatz's testimony on a photo lineup after the judge determined that the lineup was admissible:
Neuschatz also proffered a criticism of the photo lineups presented to Josh, previously ruled admissible by the trial judge. Such generalized expert testimony in limited circumstances may be pertinent at a hearing on a motion to suppress, but once the court has ruled photo-lineup evidence is admissible, offering such testimony at trial encroaches upon a legal issue already determined and usurps the trial judge's discretionary authority.
*Carrothers*, 148 So.3d at 340–41 (¶ 184) (Randolph, P.J., specially concurring).

5 The State's witnesses who testified that they knew about the reward were: Patricia Odom, Katherine Snow, James Kennedy, Mary Fleming, and Clemmie Fleming.

6 The remaining venire members did not identify their race on the juror questionnaire.

7 In *People v. Sierb*, the Michigan Supreme Court recognized that a rule prohibiting retrial on the basis of a due process violation would lead to problems with arbitrary application: "[I]f recognized, guidelines for responsible decision making in applying the new remedy would be scarce and open-ended. If three trials are too many under substantive due process, why are not two? It could follow that either any retrial after a mistrial is barred as a violation of substantive due process, or that the theory as applied would result in arbitrary assertion of judicial authority." *Sierb*, 581 N.W.2d at 224.

8 *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

9 The record does not indicate whether Cunningham was nodding in the affirmative or the negative.

10 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

11 *See Ex Parte Williams*, 594 So.2d 1225, 1227 (Ala. 1992) ("It is clear from these cases that there is presently a trend in the law to allow expert testimony on the subject of human memory."); *Skamarocius v. State*, 731 P.2d 63, 66–67 (Alaska 1987); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208, 1219 (1983), *overruled on different grounds by State v. Benson*, 232 Ariz. 452, 307 P.3d 19 (2013); *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242, 244–45 (1993); *People v. Jones*, 30 Cal.4th 1084, 135 Cal.Rptr.2d 370, 70 P.3d 359, 388 (2003) ("Exclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitnesses identification and gives it independent reliability."); *People v. Campbell*, 847 P.2d 228, 233 (Colo. App. 1992); *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705, 731–32 (2012); *Hager v. U.S.*, 856 A.2d 1143, 1147 (D.C. 2004); *McMullen v. State*, 714 So.2d 368, 371 (Fla. 1998); *Johnson v. State*, 272 Ga. 254, 526 S.E.2d 549, 552 (2000); *People v. Enis*, 139 Ill.2d 264, 151 Ill.Dec. 493, 564 N.E.2d 1155, 1165 (1990); *Cook v. State*, 734 N.E.2d 563, 570 (Ind. 2000); *State v. Schmitz*, 579 N.W.2d 317, 319 (Iowa 1998) ("[T]he admissibility of expert testimony relating to the accuracy of eye witness identification rests within the sound discretion of the trial court."); *State v. Carr*, 300 Kan. 1, 331 P.3d 544, 690 (2014), *overruled on other grounds by Kansas v. Carr*, ___ U.S. ___, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016); *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002) (noting that the vast majority of jurisdictions have left the admission of eyewitness expert identification testimony to the discretion of trial courts); *State v. Rich*, 549 A.2d 742, 743 (Me. 1988); *Bowas v. State*, 412 Md. 392, 987 A.2d 98, 114–115 (2010); *Commonwealth v. Santoli*, 424 Mass. 837, 680 N.E.2d 1116, 1120 (1997); *State v. Barlow*, 541 N.W.2d 309, 313 (Minn. 1995); *State v. DuBray*, 317 Mont. 377, 77 P.3d 247, 255 (2003) ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *White v. State*, 112 Nev. 1261, 926 P.2d 291, 292 (1996); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 916–17 (2011); *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374, 379 (2007); *State v. Fontaine*, 382 N.W.2d 374, 378 (N.D. 1986); *State v. Buell*, 22 Ohio St.3d 124, 489 N.E.2d 795, 803 (1986); *Bristol v. State*, 764 P.2d 887, 890 (Okla. Crim. App. 1988); *State v. Lawson*, 352 Or. 724, 291 P.3d 673, 697 (2012); *Commonwealth v. Walker*, 625 Pa. 450, 92 A.3d 766, 791 (2014) ("[I]n light of the magnitude of scientific understanding of eyewitness identification and marked developments in case law during the last 30 years, it is no longer advisable to ban the use of expert testimony to aid a jury in understanding eyewitness identification."); *State v. Sabetta*, 680 A.2d 927, 933 (R.I. 1996); *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369, 372 (1991); *State v. Hill*, 463 N.W.2d 674, 676 (S.D. 1990); *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996); *State v. Clopten*, 223 P.3d 1103, 1112 (Utah 2009); *State v. Percy*, 156 Vt. 468, 595 A.2d 248, 253 (1990); *State v. Cheatam*, 150 Wash.2d 626, 81 P.3d 830, 842 (2003); *State v. Utter*, No. 13-0479, 2014 WL 1673025, at *3 (W. Va. Apr. 25, 2014); *State v. Shomberg*, 288 Wis.2d 1, 709 N.W.2d 370, 377 (2006); *Engberg v. Meyer*, 820 P.2d 70, 79–80 (Wyo. 1991).

12 Dr. Neuschatz cited studies by: (1) Neisser 1967; (2) Loftus 1979; (3) Loftus & Loftus 1990; (4) Schacter 1995; (5) Ellis, Davis & Shepard 1977; (6) Maclin, Maclin & Malpass 2001; (7) Shapiro & Penrod 1986; (8) Memon, Hope & Bull 2003; (9) Culter & Penrod 1988; (10) Culter, Penrod & Martens 1987 (study a); (11) Culter, Penrod & Martens 1987 (study b); (12) Culter 1986; (13) O'Rourke 1987; (14) Culter 2006; (15) Tulving 1983; (16) Hunt & Ellis 1974; (17) Read, Tollestrup, Hammersley, McFadden & Christensen 1990; (18) Ross, Ceci, Dunning & Toglia 1994; (19) Meissner & Brigham 2001; (20) Gibson 1969; (21) Wells & Bradfield 1998; (22) Neuschatz 2005; (23) Hafstad, Memon & Logie 2004; (24) Wells, Small, Penrod, Malpass, Fulero & Brimacombe 1998; (25) Haw & Fisher 2004; (26) Garrioch & Brimacombe 2001; (27) Neuschatz & Gutler (in progress); (28) Douglas, Smith, & Frasier-Hill 2005; (29) Malpass & Devine 1981; (30) Stebaly 1997; (31) Loftus 1993; (32) Johnson 1993; and (33) Pezdek 2007.

13 It is difficult to imagine the Majority rejecting out-of-hand the opinions of the State's pathologist as to the cause and manner of death, simply because the record does not include all of the underlying studies and data that contributed to that opinion.

• Case was originally affirmed in this Court but on remand from U. S. Supreme Court, case was remanded by this Court for a new sentencing hearing.


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No. 17-9572

IN THE

# SUPREME COURT OF THE UNITED STATES

CURTIS GIOVANNI FLOWERS,
*Petitioner*,

v.

STATE OF MISSISSIPPI,
*Respondent.*

On Petition for Writ of Certiorari to the
Supreme Court of the State of Mississippi

## BRIEF IN OPPOSITION

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# CAPITAL CASE

## QUESTION PRESENTED
## (restated)

**Whether the Mississippi Supreme Court committed reversible error in considering a prosecutor's history of adjudicated purposeful discrimination in assessing the credibility of his proffered race-neutral reasons for peremptory strikes against prospective minority jurors under the totality of the circumstances.**

## TABLE OF CONTENTS

*pages*

**TABLE OF CONTENTS** ..... ii

**TABLE OF AUTHORITIES** ..... iii

**OPINION BELOW** ..... 1

**JURISDICTION** ..... 2

**CONSTITUTIONAL PROVISIONS INVOLVED** ..... 2

**STATEMENT OF CASE** ..... 4

**REASONS FOR DENYING THE WRIT** ..... 15

I. The Judgment below is consistent with this Court's Precedent. ..... 15

II. The Mississippi Supreme Court correctly decided Petitioner's *Batson* Claim. ..... 24

**CONCLUSION** ..... 35

## TABLE OF AUTHORITIES

*pages*

**Federal Cases**


***Batson v. Kentucky***,
476 U.S. 79 (1986)..... *passim*

***Flowers v. Mississippi***,
136 S.Ct. 2157 (2015)..... *passim*

***Floyd v. Alabama***,
136 S.Ct. 2484 (Mem) (2016)..... 14

***Foster v. Chatman***,
578 U.S. ——, 136 S.Ct. 1737 (2016)..... *passim*

***Wiggins v. Cain***,
720 F.3d 255, 2(5th Cir. 2013)..... 32

***Jabari Williams v. Louisiana***,
136 S.Ct. 2156 (2016)..... 14

***Johnson v. California***,
545 U.S. 162 (2005)..... 20

***Miller El v. Cockrell***,
537 U.S. 322 (2003)..... 21, 22, 25

***Miller El v. Dretke***,
545 U.S. 231 (2005)..... 21, 22, 25, 28

***Rice v. Collins***,
546 U.S. 333 (2006)..... 32, 33

***Snyder v. Louisiana***,
552 U.S. 472 (2008)..... 16, 18

**State Cases**

*Flowers v. State*,
773 So.2d 309 (Miss. 2000).....2, 3

*Flowers v. State*,
842 So.2d 531 (Miss. 2003).....3, 4

*Flowers v. State*,
947 So.2d 910 (Miss. 2007).....4, 5

*Flowers v. State*,
240 So.3d 1082 (Miss. 2017).....18

*Manning v. State*,
735 So.2d 323 (Miss. 1999).....32

*Webster v. State*,
754 So.2d 1232 (Miss. 2000).....32, 33

**Federal Statutes**

28 U.S.C. § 1257.....2

No. 17-9572

IN THE

# SUPREME COURT OF THE UNITED STATES

CURTIS GIOVANNI FLOWERS,
*Petitioner,*

v.

STATE OF MISSISSIPPI,
*Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Mississippi

# BRIEF IN OPPOSITION

This matter is before the Court on the Petition of Curtis Giovanni Flowers for a Writ of Certiorari to the Supreme Court of the State of Mississippi. The respondent, the State of Mississippi, prays this Court will deny his Petition.

## OPINION BELOW

The Mississippi Supreme Court affirmed Flowers's four capital murder convictions and sentence of death by lethal injection on November 2, 2017, and denied his Motion for Rehearing on February 22, 2018. The decision became final on March 1, 2018, when the Mandate issued. The Opinion below is reported at 240 So.3d 1082, and appears in the Appendix attached to the Petition.[1]

[1] To avoid confusion, Respondent will follow Petitioner's lead and use the reference "*Flowers VI(B)* when referring to the decision below.

## JURISDICTION

Petitioner seeks to invoke the Court's certiorari jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This matter involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

As he points out in his Petition, Petitioner, Curtis Flowers, has been tried six times in connection with the 1996 execution-style murders of Bertha Tardy, Robert Golden, Derrick Stewart, and Carmen Rigby. The murders took place on July 16, 1996, inside Tardy Furniture, a retail furniture store that was located in downtown Winona, which is located in rural Montgomery County, Mississippi. Petitioner was initially charged with one count of capital murder while engaged in the commission of armed robbery in four separate indictments. The State moved to consolidate the cases, but withdrew its motion. Petitioner subsequently moved to consolidate the cases, but the Circuit Court of Montgomery County denied his motion.

***Flowers I***

Petitioner was first tried for the capital murder of Bertha Tardy in Lee County, Mississippi, after a change of venue was granted. *Flowers v. State*, 773 So.2d 309, 312 (¶¶ 2-3) (Miss. 2000) (*Flowers I*). Petitioner's first trial began on October 13, 1997, and ended with the Lee County jury finding him guilty and recommending a sentence of death. *Id.* at 312, 313 (¶¶ 3, 6). He directly appealed to the Mississippi Supreme Court with twenty claims of error. *Id.* at 316-17 (¶ 19).

On direct review, the Mississippi Supreme Court found "the State improperly employed a tactic or trial strategy of trying [Petitioner] for all four murders during this trial for the murder of

[Bertha] Tardy alone.... Evidence of the other crimes was admitted which was not necessary in order for the State to prove its case in chief against [Petitioner] for the murder of Ms. Tardy." *Id.* at 317 (¶ 20). It also found "that the prosecutor repeatedly asked improper questions not in good faith in which there was no basis, in fact." *Id.* at 317 (¶ 21). The Mississippi Supreme Court held Petitioner "did not receive a fair trial," and reversed and remanded the case to the Circuit Court of Montgomery County for a new trial. *Id.* at 317 (¶¶ 20, 21). In doing so, the Court "also note[d] an accumulation of errors which warrant[ed] reversal[,] but found it "unnecessary to discuss the other assignments of error...." *Id.* at 317 (¶ 21).

***Flowers II***

Petitioner was then tried for the capital murder of Derrick "BoBo" Stewart. Petitioner's second trial was tried to a Harrison County jury on March 22, 1999, after a change of venue was granted and the case transferred to the Circuit Court of the First Judicial District of Harrison County. *Flowers v. State*, 842 So.2d 531, 535 (¶¶ 2, 3) (Miss. 2003) (*Flowers II* ). Importantly, Petitioner's second trial began without the benefit of the *Flowers I* decision, which was handed down on December 21, 2000. *Id.* at 535 (¶ 2). Petitioner's second trial ended with the Harrison County jury finding him guilty of capital murder and recommending a sentence of death. *Id.* at 535 (¶ 3). He directly appealed to the Mississippi Supreme Court with ten claims of error. *Id.* at 537-38 (¶ 17).

As in *Flowers I*, the Mississippi Supreme Court found "the State employed a tactic or trial strategy of trying [Petitioner] for all four murders during this trial for which he was indicted only for the murder of Derrick Stewart. Evidence of other victims was admitted through photographs, diagrams and other testimony, which was neither relevant nor necessary to prove the State's case-in-chief against [Petitioner] for the murder of Stewart." *Id.* at 538 (¶ 18). The state court further found

"that the prosecutor repeatedly argued facts not in evidence ... during cross-examination of several witnesses and during the closing arguments of both the district attorney and the assistant district attorney." *Id.* at 538 (¶ 19). Additionally, the state appellate court found hearsay had been improperly admitted into evidence through the testimony of an expert witness for the State. *Id.* The court also noted, as it did in *Flowers I*, that an accumulation of errors warranted reversal without further discussion. *Id.* The court held Petitioner "did not receive a fair trial," and reversed and remanded Petitioner's second case for a new trial. *Id.* at 538 (¶ 18).

***Flowers III***

Petitioner's third trial began on February 2, 2004, in Montgomery County, after the decisions in *Flowers I* and *Flowers II* had been published. *Flowers v. State*, 947 So.2d 910, 916 (¶ 5) (Miss. 2007) (*Flowers III* ). In light of those decisions, the four cases against Petitioner were consolidated and tried as one in Montgomery County. *Id.* A jury was empaneled from a pool of 600 potential jurors. *Id.* at 916 (¶ 6). As the Mississippi Supreme Court would later note:

> An initial jury pool consisting of 500 citizens was drawn, with 300 scheduled to appear on the first day of trial, a Monday, and the remaining 200 instructed to report to the courthouse on Wednesday. When the judge realized he may not have enough qualified jurors to empanel a jury from the initial venire, he entered an order for the clerk to draw the names of 100 more potential jurors. The voir dire process consisted of both group and individual examination. When the parties began exercising their peremptory strikes, the State exercised its first seven on African–American jurors. At this point, defense counsel lodged a *Batson* challenge, contending that the strikes were racially motivated. The judge declared that Flowers had shown a prima facie case of discrimination under *Batson* and required the State to proffer race-neutral reasons for the exercise of peremptory strikes, which Flowers then rebutted. The State also exercised its remaining five peremptory challenges of potential jurors on African–Americans. After the State had exercised all of its peremptory challenges, two African–American jurors were seated; however, one of those two was later excused after he informed the judge that he could not be a fair and impartial juror. The State then exercised all three of its strikes of alternate jurors on African–Americans. At the end of the jury selection process, the trial court ruled that the State had not exercised its peremptory challenges in a racially discriminatory

manner and denied Flowers' *Batson* challenge.

*Id.* (footnote omitted). Petitioner's third trial ended with the Montgomery County jury finding him guilty on all four counts capital murder and recommending the death penalty be imposed. *Id.* at 916 (¶ 7). He directly appealed to the Mississippi Supreme Court with eighteen claims of error. *Id.*

Petitioner's first claim of error on direct review was that the State's use of all twelve peremptory strikes against African-American prospective jurors and all three peremptory strikes against African -American prospective alternate jurors violated *Batson v. Kentucky*, 476 U.S. 79 (1986). *Id.* at 916-17 (¶ 7). Four Mississippi Supreme Court Justices agreed after finding "the State engaged in racially discriminatory practices during the jury selection process and that the trial court committed reversible error in upholding the peremptory strikes exercised against Vickie Curry and Connie Pittman." *Id.* at 939 (¶ 73).[2] The plurality reversed and remanded for a new trial without reaching the remaining claims. *Id.*

But four dissenting Justices disagreed without the plurality. The dissent found no *Batson* violation, and would have affirmed the decisions to uphold the peremptory challenges of prospective jurors Curry and Pittman. *Id.* at 942-43 (¶¶ 89-94) (Smith, C.J., dissenting). It also took issue with the plurality's concerns with the peremptory strike against prospective juror, Sharon Golden—a peremptory strike the plurality concluded was in accordance with *Batson*. *Id.* at 941-42 (¶¶ 85-88).

***Flowers IV***

Prior to trial in *Flowers IV*, the State announced that it would not seek death due, in part, to

---

[2] Justice Graves authored the plurality opinion in *Flowers III*, and was joined by Justices Waller, Diaz, and Dickinson. Justice Cobb concurred in result only with a separate written opinion, joined in part by Justice Dickinson. Chief Justice Smith dissented with separate written opinion, and was joined by Justices Easley, Carlson, and Randolph.

the defense presenting a last-minute defense witness. Jury selection in *Flowers IV* commenced on November 26, 2007. No *Batson* objection was lodged at trial. *Flowers IV* ended in a mistrial.

***Flowers V***

Jury selection in *Flowers V* commenced on September 22, 2008. The venire was comprised of 600 prospective jurors. After juror qualification, the venire consisted of ninety-six white individuals and seventy-one African-American individuals. Ten African-Americans were excused for views on the death penalty; more than twenty knew or were related to Petitioner or members of his family; three more could not objectively consider the evidence. The trial court made two on-the-record observations. It recognized that juror qualification and voir dire dramatically changed the composition of the venire as more than two-and-a-half times as many people were excused because they knew Petitioner or had some knowledge of the case. The trial court also observed the defense knew that there was a possibility that there would be a number of black citizens that would be excused because of knowledge of the case or Petitioner. Petitioner moved for a change of venue in *Flowers I* and *Flowers II* but not in *Flowers III*, *Flowers IV*, *Flowers V* or *Flowers VI*.

On September 24, a jury and three alternates were empaneled. Mary Annette Purnell, an African-American and prospective Juror 70, was seated as Alternate Juror 3. Shortly after, a conference took place in judge's chambers. There, the trial court and the parties learned that Ms. Purnell knew Petitioner, and had recently met with Petitioner at the Carroll County Jail as well as other members his family at Petitioner's parents' home. (Supplemental R. at S9-S13). The trial court, in turn, questioned Ms. Purnell in open court as follows:

> THE COURT: I have had it called to the Court's attention that you are on the visitation list at the county jail to visit [Petitioner]; is that correct?

[MS.] PURNELL: Yes, it is.

THE COURT: And you stated under oath yesterday that you did not know [Petitioner], that you had never — didn't know his family, didn't know anybody involved; is that correct?

[MS.] PURNELL: Yes, sir, it is.

THE COURT: And we've got a log from the jail where I think 60-something calls, I don't know, but a number of phone calls from the county jail to your house at your telephone number. Can you explain how that happened?

[MS.] PURNELL: I received calls from [Petitioner] and my nephew,

....

THE COURT: Well, Miss. Purnell, I do find that you perjured yourself under oath during the questioning process. I am going to strike you off this panel at this time, but I am also going to order that you be bound over to the grand jury to await action to decide whether you should be indicted for the crime of perjury.

I take perjury very seriously, and you – it seems crystal clear to this Court that you have, in fact, perjured yourself. And so I am going to order that you be jailed on a perjury charge.

I am going to set bond at $20,000. But you are to be held in the county jail until you post bond and until the grand jury can decide whether to indict your for perjury.

(Id. at S13, S14-S15).

A second conference took place in judge's chambers the following day on Thursday, September 25, 2008. During this conference, counsel for Petitioner confirmed the fact that Petitioner knew Ms. Purnell. Counsel also produced a written note that Petitioner had written and passed to him during voir dire on Tuesday, September 23, (Id. at S15-S17). The note, which concerned Purnell, read:

> Juror Number 70 is a good juror. I really think we need to fight for her. We must because she a good, honest person whom I've known for a while now.

(Id. at S16).

The trial court received several notes from jurors during deliberations. (CP vol. 14 at 1782-88.) One juror wrote:

> A juror, Mr. Bibb, announced during deliberations that he was present at a lawnmower shop behind Tardy Furniture all day on the day of the murders and has told us that he knows there was no investigation, questioning, or canvassing of the area and that all evidence in the store was planted because he personally observed the activity at the store that day.
>
> I could not in good faith withhold this information from the Court.
>
> Please advise me on how to continue.
>
> ....

(Id. at 1784.) Another juror stated that:

> It has come to the attention of the Jury that a member of the jury has knowledge of the investigation that was not presented in court. It has impeded the rest of the jurors in reaching a decision. We request guidance in further action.

(Id. at 1781, 1787). Ultimately, the jury foreman notified the trial court that the jury could not agree on a verdict. (Id. at 1797). The trial court declared a mistrial and dismissed the jurors, except for Juror James Bibbs. (CP vol. 15 at 1912). Mr. Bibbs was instructed to remain seated. After the other jurors had left the courtroom, the trial court called Mr. Bibbs to the bench and asked:

> [THE COURT:] Do you remember last week that the jury was questioned under oath and there were a number of questions about this case that I -- I mean I questioned the jury at length for almost two days. I don't think I've ever asked any more questions of a jury panel that I asked this one.
>
> And I remember asking a specific question, and that is, of all the panel, have you heard anything about the case. Do you remember heard anything about the case. Do you remember that question being asked
>
> [MR.] BIBBS: Yes, I remember.

THE COURT: And your answer to the Court was that you had heard about the case in the media.

And then I asked you – I knew you had a relative in law enforcement. And I – and I asked you if you had heard anything about the case from your relative. And you indicated that you had not.

Well, I receive[d] a note from the jury less than an hour into deliberation yesterday advising that there was a particular juror who was trying to bring out information during deliberations that had not been presented here in open court.

And then I got another note right about lunch today from a juror who specifically stated that you were at a lawn mower repair shop the same day as these murders, that you were real close to the shop. And that you knew the police officers were not doing what they said because you were in the neighborhood. That juror further stated to me that you stated that you knew the police didn't – that, that some of the evidence in Tardy Furniture store was planted. And so I want to know if that occurred. Did you –

[MR.] BIBBS: Only –

THE COURT: – tell the jury those things?

[MR.] BIBBS: Only thing I told the jury was that I was in the alley at the time and didn't anyone come around there. That is the only thing I said

THE COURT: And you didn't – you didn't – you didn't mention anything about the evidence inside the store or that the law –

[MR.] BIBBS: No.

THE COURT: – officers –

[MR.] BIBBS: No.

THE COURT: – didn't go around –

[MR.] BIBBS: No.

THE COURT: – investigating.

[MR.] BIBBS: No. I, I didn't say – I said we were standing around at the repair shop. At the – at the time I was there, didn't anyone

come around there. That is the only thing I said.

THE COURT: Well, is there any reason why when we were questioning you last week under oath that you didn't bother to mention to the Court that you had knowledge of this case?

[MR.] BIBBS: Well, not – I mean I, I misunderstood you.

THE COURT: No, sir. You did not misunderstand. I could have the court reporter right now read what was said by you so don't stand there and lie to me. Now, is there any reason why you felt compelled to perjure yourself before this Court last week?

[MR.] BIBBS: I wasn't intending to do that, Judge.

THE COURT: Well, I am going to let the grand jury of this county decide whether you committed perjury because in my eyes –

(MR. CARTER STARTED WALKING OUT OF THE COURTROOM.)

THE COURT: – you have committed perjury. And Mr. Carter, if you – you have a seat, Mr. Carter. You have not been –

(MR. CARTER RETURNED TO COUNSEL TABLE AND WAS SEATED.)

....

Mr. Bibbs, I am going to bind you over to await the action of the grand jury. There will be, I'm sure, several members of this panel that were on this jury that will be testifying next week in front of the grand jury. But I do find probably cause at this time to believe that you have committed the crime of perjury.

I am going to order you bound over to await the action of the grand jury. I am going to have you jailed right now, and I am going to set bond at $20,000.

I'm not – I mean this is absolutely ridiculous that I have jurors come into this court and lie to this Court in order to get on a jury. And that is exactly what you have done, Mr. Bibbs.

(Id. at 1912-16).

***Flowers VI***

On April 20, 2010, a special venire comprised of 600 prospective jurors was drawn. (Trial Tr. vol. 26 at 348). A juror questionnaire was mailed to each prospective juror. (CP vol. 15 at 2014-

17). Based on the returned questionnaires, the venire initially "consisted of forty-two percent African-Americans and fifty-five percent whites." *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104).

Jury selection in *Flowers VI* commenced on June 4, 2010. (Trial Tr. vol. 27 at 477). Voir dire began on June 10, 2010. At that time, the venire was comprised of eighty-nine whites and sixty-seven African Americans. (CP vol. 22 at 3002). After voir dire and challenges for cause, forty-nine prospective African-American jurors had been excused for their kinship or friendship with Petitioner and members of his family, or their views on the death penalty. (Id. at 3002-04). Following voir dire, Petitioner moved to preclude the prosecution from using peremptory strikes against prospective African-American jurors (Trial Tr. vol. 35 at 1733-36). He also moved to have the trial court perform a "complete and random reshuffle of the remaining names." (Id. at 1747). He also moved to quash the venire and requested a mistrial because there was an insufficient number of African-Americans. (Id. at 1749, 1750-52; CP vol. 22 at 3002). Those motions were denied and the peremptory strike phase began. The State accepted Alexander Robinson, a prospective African-American juror, then exercised six peremptory strikes—five were against prospective African-American jurors. (CP vol. 22 at 3022). Petitioner lodged a *Batson* objection after the State exercised its fourth strike against a prospective African American juror, and reminded "the Court's going to have to consider the totality of the circumstances...." (Trial Tr. vol. 35 at 1758-59).

During the *Batson* hearing, the State provided the following race-neutral reasons for its peremptory strikes. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders.[3]

---

[3] During the *Batson* hearing, the prosecution introduced an abstract of a municipal court judgment obtained by Tardy Furniture against Carolyn Wright into evidence as State's Exhibit 1 to the *Batson* hearing. (Trial Tr. vol. 35 at 1771). Petitioner argued the prosecution's investigation and efforts to obtain the abstract was evidence of pretext, as there did not appear to be investigations into prospective white jurors. (Id. at 1771-72). The prosecution responded by stating that it "checked every prospective juror on the list to see

Wright also worked with Petitioner's father, Archie. (Trial Tr. vol. 35 at 1763; CP vol. 22 at 3022). Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham was then "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her." (Id. at 1775-76; CP vol. 22 at 3022). Cunningham also worked with Petitioner's sister, Sherita Baskin, on an assembly line. Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." (Id.; CP vol. 22 at 3022).

Juror 45, Edith Burnside, stated that Petitioner was "very good friends with both of her sons." Ms. Burnside also was sued by Tardy Furniture. Finally, Ms. Burnside "at one point said she could not judge." Ms. Burnside stated the "fact that she knew [Petitioner] so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." (Id. at 1783-84; CP vol. 22 at 3022). Juror 53, Flancie Jones, was related to Petitioner. "She admitted that she was related-she was cousin-or [Petitioner]'s sister, Angela Jones, is her niece." (Id. at 1786; CP vol. 22 at 3022). Jones was approximately thirty minutes late for court on two separate occasions. (Id.; CP vol. 22 at 3022). She was "back and forth all over the place on her opinion about the death penalty." She stated during voir dire that she was in favor of the death penalty; on her jury questionnaire she stated she was strongly against the death penalty. When asked about that inconsistency, Jones admitted that she lied on the questionnaire. (Id. at 1786-87; CP vol. 22 at

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if they had ever had nay run-ins or were sued by Tardy Furniture after these murders...." (Id. at 1772). The trial court corrected Petitioner by noting that "the entire panel was asked first if they had ever had a charge account with Tardy Furniture. And then they were asked if they had every been sued by Tardy Furniture. It was not just asked of African-American jurors, as you claimed." (Id. at 1773).

3022). Finally, Juror 62, Diane Copper, worked with Petitioner's father. She also worked with Petitioner's sister at a shoe store. And, Copper stated "that she leaned toward favoring [Petitioner's] side of the case." (Trial Tr. vol. 36 at 1794; CP vol. 22 at 3022).

Petitioner attempted to rebut some of the prosecution's race-neutral reasons. (CP vol. 22 at 3023). With respect his attempts, the trial court expressly found as follows:

> [T]he defense tried to rebut the strikes of jurors 14 and 44 by arguing that the prosecution tendered juror 17, even though she knew Archie Flowers and other members of the Flowers family. However, this court found that a bank teller, who waits on customers at a bank, is substantially different from working at the same business establishment with members of the defendant's family. It was also abundantly clear that juror 17 had a much closer relationship with members of the victims families tha[n] she had with anyone in [Petitioner's] family. In fact, this was of such a concern to [Petitioner] that he sought to have this court strike juror 17 from the venire for cause. This court will also note that the prosecution did not strike juror 8, an African-American male, even though he knew Archie Flowers, Jr. from the Auto Zone store. It was evident to this court that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of [Petitioner's] family.
>
> The defense also tried to rebut the strike of juror 53, by arguing that the State tendered juror 51, even though he had not originally been forthcoming about the fact that he had heard about the case from being in a previous venire. However, this court found that [Petitioner] failed to rebut the strike of juror 53, because juror 53 intentionally lied on her questionnaire, while there was nothing to indicate that juror 51 had intentionally been untruthful. Ultimately, this court found the State offered race neutral reasons for all of the peremptory strikes utilized by the prosecution and that the defense failed to rebut those reasons.

(Id.). A jury, comprised of eleven whites and one African-American juror, was empaneled. Three alternate jurors were seated. Two were white; one was African-American. (Id. at 3004; Trial Tr. vol. 36 at 1801-05). On June 18, 2010, that jury found Petitioner guilty on all four counts of capital murder. (Trial Tr. vol. 45 at 3245-46). The next day, the jury returned a verdict recommending a sentence of death for each conviction. (Trial Tr. vol. 47 at 3480-84).

Petitioner directly appealed the judgements of his convictions and sentences with eighteen

claims of error. The Mississippi Supreme Court, finding no error, affirmed Petitioner's convictions and sentences on November 13, 2014. After his motion for rehearing was denied, Petitioner petitioned this Court for review of the following two questions:

> I. Whether compelling a defendant to stand trial six times on the same charges, where three judgments were reversed due to prosecutorial misconduct and two other trials ended with hung juries, violates the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment?
>
> II. Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?[4]

On May 23, 2016, this Court held the decision of a Georgia habeas court and the Georgia Supreme Court, that Timothy Tyrone Foster failed to show purposeful discrimination for two peremptory strikes, was clearly erroneous. *Foster v. Chatman*, 578 U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016). This Court's review of the state court record and evidence admitted during Foster's state habeas proceedings revealed: (1) disparate treatment of prospective African-American jurors, (2) shifting reasons for strikes, (3) misrepresentations of the record, and (4) a "persistent focus on race" in the prosecution's case file. *Foster*, 136 S.Ct. at 1754. Because the decision was clearly erroneous, the Court reversed and remanded Foster's case for further proceedings. *Id.* at 1755.

Then on June 20, 2016, the Court issued GVRs in three pending cases. The Court granted three pending writ applications, vacated the judgments of three state supreme courts—including the Mississippi Supreme Court's in *Flowers VI(A)*—and remanded for reconsideration in light of *Foster*. *Jabari Williams v. Louisiana*, 136 S.Ct. 2156 (Mem) (2016), *Christopher Anthony Floyd v. Alabama*, 136 S.Ct. 2484 (Mem) (2016), and *Curtis Giovanni Flowers v. Mississippi*, 578 U.S. ——,

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[4] Petition for a Writ of Certiorari to the Mississippi Supreme Court, *Curtis Giovanni Flowers v. Mississippi*, 136 S.Ct. 2157 (U.S. Jun. 29, 2015) (No. 14-10486).

136 S.Ct. 2157 (Mem) (2016). On November 2, 2017, the Mississippi Supreme Court published its decision on remand from this Court. The court reconsidered Petitioner's *Batson* claim in light of *Foster*, found no *Batson* violation, reinstated Petitioner's convictions and sentences, and affirmed the judgment of the trial court. *Flowers VI(B)*, 240 So.3d 1082.

## REASONS FOR DENYING THE WRIT

Petitioner raises one issue for consideration, and claims it warrants discretionary review. It does not. The writ should not issue because judgment below is consistent with the precedent of this Court. Further, the Mississippi Supreme Court correctly decided his *Batson* claim. For the reasons discussed below, the Court should deny the petition.

### I. The judgment below is consistent with this Court's precedent.

The question presented in this case is a request for fact-specific error correction concerning the application of properly stated and well-settled principles of law. Petitioner contends that the Mississippi Supreme Court ignored the exceptional circumstances in this case, and limited its review by deferring to the trial court without considering the possibility that its decision was clearly erroneous. He argues that, to comply with the GVR, the Mississippi Supreme Court was required to reconsider his *Batson* claim without deferring to the trial court's factual findings. (Pet. for Cert. at 15-18). He is mistaken. Petitioner is attempting to manufacture a conflict by claiming the Mississippi Supreme Court bucked its obligation to reconsider his *Batson* claim in light of *Foster*, and maintained "an adherence to an ahistorical approach" of ignoring evidence of past discrimination in assessing the reasons given for exercising five peremptory strikes against prospective African-American jurors. (Id. at 15).

### A. *Foster* did not alter the deference given to trial courts.

Petitioner contends that, to comply with the GVR, the Mississippi Supreme Court was required to reconsider his *Batson* claim without deferring to the trial court's factual findings. And he argues that the Mississippi Supreme Court ignored the exceptional circumstances in this case, and limited its review by deferring to the trial court without considering the possibility that its decision was clearly erroneous. (Pet. for Cert. at 15-18). He is mistaken.

While the Court's GVR mandated the Mississippi Supreme Court reconsider Petitioner's case in light of *Foster*, *Foster* did not change the applicable principles for analyzing a *Batson* claim. *Flowers*, 136 S.Ct. at 2158 (ALITO, J., dissenting). In fact, the Court reiterated the teachings of *Batson v. Kentucky*, 476 U.S. 79 (1986), and the three-part process for determining whether a strike is discriminatory. *Foster*, 136 S.Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 476-78 (2008)). The Court's analysis in *Foster* was confined to *Batson's* third step and focused on case-specific evidence, which supported the conclusion that Foster had carried his burden of persuasion by demonstrating the prosecution purposefully discriminated during jury selection.

In that case, Timothy Foster confessed to killing a 79-year-old widow in 1986. *Foster*, 136 S.Ct. at 1743. His trial began the following year. *Id.* Jury selection took place in two phases: removal-for-cause then peremptory strikes. *Id.* Of the forty-two prospective jurors who remained when the peremptory strikes phase began, four were African-American. *Id.* The prosecution had ten strikes; Foster had twenty. *Id.* The prosecution used nine strikes, and removed the four African-American jurors. *Id.* So Foster objected, claiming the strikes against the African-Americans violated *Batson v. Kentucky*. *Id.* His objection was overruled. *Id.* Foster was tried, convicted, and sentenced to death. *Id.*

After trial and appeal, Foster sought state habeas relief. He obtained the DA's case file during these proceedings, and developed a considerable record of purposeful discrimination by introducing documents from the DA's case file into evidence during an evidentiary hearing. *Id.* Despite this evidence, both the state habeas court and the Georgia Supreme Court denied Foster relief. *Id.* at 1742-43, 1745. This Court granted certiorari, considered Foster's *Batson* claim, and reversed. *Id.* at 1754-55.

The Court's decision to reverse was based on the evidence presented during the state habeas evidentiary hearing, which showed Foster had carried his burden of persuasion by demonstrating purposeful discrimination during jury selection. That evidence included: (1) four copies of the jury venire list with the names of the prospective African-American jurors highlighted in green, and a legend that indicated the names highlighted green, "represents Blacks"; (2) an affidavit drafted by an investigator with the DA's Office, which compared the prospective African-American jurors and stated "[this one] might be okay"; (3) handwritten notes related to prospective African-American jurors with references B#1 for Eddie Hood, B#2 for Louise Wilson, and B#3 for Corrie Hinds; (4) a list of jurors who survived removal-for-cause with the letter "N" appearing next to the prosecution's strikes; (5) a list of six names, titled "definite NO's," which included the names of all qualified African-American jurors; (6) a handwritten document, titled "Church of Christ"; and (7) the returned jury questionnaires with the race response circled. *Id.* at 1744. "In sum, the Court's decision in *Foster* relied on substantial, case-specific evidence in reaching its conclusion that the prosecution's proffered explanations for striking black prospective jurors could not be credited." *Id.* at 2159. *Foster* involves evidence that was developed after trial, and offered to show the prosecution's reasons for striking prospective African-American jurors at trial could not be credited.

In reconsidering Petitioner's *Batson* claim, the Mississippi Supreme Court noted that "*Foster* hinged on several apparent misrepresentations made by the prosecution" at trial, rather than a "prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118 (¶ 87). Even so, the court looked to *Foster* for guidance in considering "other issues that might place our original opinion in *Flowers [VI]* in error." *Id.* In doing so, the court correctly stated the fact that *Foster* concerns *Batson's* third step, which "'turns on factual determinations, and, "in the absence of exceptional circumstances," we defer to state court factual findings unless we conclude that they are clearly erroneous.'" *Id.* at 1119 (¶ 91) (quoting *Foster*, 136 U.S. at 1747 (quoting *Synder v. Louisiana*, 552 U.S. 472, 477 (2008))).

The Mississippi Supreme Court then addressed Petitioner's argument, that it failed to follow *Foster's* "totality-of-the-circumstances-approach," by omitting the prosecutor's "well-documented history from its assessment of the credibility of his facially neutral reasons." *Id.* at 1120 (¶ 98). In doing so, the court noted that "'[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" *Id.* at 1122 (¶ 103) (quoting *Foster*, 136 U.S. at 1748). It also noted that "'determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Id.* (quoting *Foster*, 136 U.S. at 1737, 1748). The court then expressly quoted several passages from the record on appeal, which showed that Petitioner made certain the trial court considered the prosecutor's history. *Id.* at 1122-24 (¶¶ 106-08).[5]

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[5] The first quoted passage appears at Trial Tr. vol. 35 at 1734-35; the second quoted passage appears at Trial Tr. vol. 35 at 1739; the third passage appears at Trial Tr. vol. 35 at 1764-65; the fifth quoted passage appears at Trial Tr. vol. 35 at 1766-67; and the sixth and final quoted passage appears at Trial Tr.

Petitioner argues the passages quoted in *Flowers VI(B)* do not support the finding that the trial court considered the district attorney's history. He claims "there is absolutely no evidence in the record supporting that assertion." (Pet. for Cert. at 17). He then states that the Mississippi Supreme Court "offers no language at all suggesting the trial court either shared counsel's view or acted on it." (Pet. for Cert. at 17). But the majority opinion in *Flowers VI(B)* clearly states that "the trial court was presented with and rejected [Petitioner]'s present argument ...[,]" and "the trial court certainly considered circumstances surrounding the previous trial as evidenced by its response to [Petitioner]'s *Batson* claim[.]" *Flowers VI(B)*, 136 S.Ct. at 1123 (¶¶ 107, 108). Petitioner also states that the trial court's responses to his arguments of past discrimination in no way reflect "any 'consideration' of that history." (Pet. for Cert. at 17). Respondent submits the record on appeal, as evidenced by the majority opinion in *Flowers VI*, is replete with instances where the trial court heard, considered, and rejected Petitioner's argument that the prosecutor's history must be considered under the totality of the circumstances.

Briefly, Respondent would note that Petitioner is incorrect in asserting that "for while the state court majority touts [the trial judge's response] as a reaction to counsel's argument, the trial court's statement was actually made *before* the argument was." (Pet. for Cert. at 18). He cites the trial court's response on page 1738-39 of the Trial Transcript and two instances where counsel repeated the following argument. (Id.). Beginning on page 1734, counsel argued that:

> We had in the last trial urged that should this jury – that the prosecutor be, be precluded from making peremptory strikes because so much of this – *because there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this prosecution. It's happened – the predecessor in Flowers II, in Harrison County, found a Batson*

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vol. 35 at 1787-89. *Flowers*, 240 So.3d at 122-24 (¶¶ 106-08).

*violation and ruled a strike by the State. So that in two proceedings and on the basis of what has been a persistent patter of simply, you know, asking things that are clearly, if not flatly race or at least race-based....*"

(Trial Tr. vol. 35 at 1734-35) (emphasis added). Counsel made this argument *before* the trial court responded, as it appears in the majority opinion in this case. *Flowers VI(B)*, 240 So.3d at 1122 (¶ 106). And as Petitioner points out, counsel repeatedly made this argument throughout jury selection.

The Mississippi Supreme Court did reconsider Petitioner's *Batson* claim in light of *Foster*. *Foster* concerned evidence that demonstrated the prosecution's reasons for striking prospective African-American jurors "'ha[d] no grounding in fact,' were 'contradicted by the record,' and simply 'cannot be credited....'" *Flowers*, 136 S.Ct. at 2158 (Alito, J., dissenting) (quoting *Foster*, 136 S.Ct. at 1749, 1750, 1751). The Mississippi Supreme Court reviewed the record on appeal and failed to find exceptional circumstances that showed the trial court's factual findings were clearly erroneous. In other words, the court verified the trial court's findings. Before addressing Petitioner's *Batson* claim, the court stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124 (¶ 111). Respondent submits the Mississippi Supreme Court correctly stated and properly applied the well-settled principles of this Court's *Batson* jurisprudence in deferring to the trial court's factual findings.

Petitioner asks the Court to assume the prosecutor violated *Batson* in this case because the prosecutor was found by four justices of the Mississippi Supreme Court to have violated *Batson* in *Flowers III*. This is inconsistent with this Court's *Batson* jurisprudence. *See Johnson v. California*, 545 U.S. 162, 171 (2005) (recognizing that the ultimate "burden of persuasion rests with, and never

shifts from, the opponent of the strike"); *Batson v. Kentucky*, 476 U.S. 79, 98 (1986). He does not explain how the prosecutor's history of adjudicated *Batson* violations constitute substantial, case-specific evidence that demonstrates any of the prosecution's strikes against the prospective African-American jurors should not be credited. He makes no mention of the fact that four Mississippi Supreme Court justices, who dissented in *Flowers III*, found no *Batson* violation whatsoever. Nor does he address facts in the record, which significantly undermine, if not wholly discount his *Batson* claim. *See Foster*, 136 U.S. at 1748 (stating that "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted"); *Miller–El v. Dretke*, 545 U.S. 231, 252 (2005) (*Miller–El II*). Those facts include: (1) prospective jurors' relationships with Petitioner and members of his family in *Flowers VI* and earlier trials; (2) an alternate juror, who knew Petitioner and committed perjury in an attempt to be seated as a juror in *Flowers V*; (3) a juror who caused the mistrial in *Flowers V* by tainting the jury with information disclosed during deliberations but was not admitted into evidence or disclosed during voir dire; (4) Petitioner's motion to reshuffle the jury following challenges for cause;[6] (5) Petitioner's decision to be tried in Montgomery County after arguing in *Flowers VI* and earlier cases that he could not be fairly tried in that county; and (6) prospective jurors' relationships with defense witnesses.

**B. The judgment below is consistent with *Miller-El*.**

Next, Petitioner claims the judgment below is inconsistent with *Miller–El II*. (Pet. for Cert. at 18-19). He argues "*Flowers VI(B)* does acknowledge that *Miller-El* attached probative value to

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[6] Trial Tr. vol. 35 at 1747. Precedent recognizes the use of a "shuffle" may indicate an attempt to manipulate the racial composition of the venire to be questioned. *Miller–El II*, 545 U.S. at 245 (quoting *Miller El v. Cockrell*, 537 U.S. 322, 346 (2003) (*Miller-El I*)).

prior history, but then dismisses that precedent with a remarkable comparison: 'The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*.'" (Id. at 18). According to Petitioner, the district attorney's "prior history is *more* probative of discriminatory intent than was the historical evidence in *Miller-El*." (Id.). This argument is an extension of the previous argument. (Pet. for Cert. at 18).

The Court in *Miller-El II* identified five factors to be used in "ferreting out" discriminatory pretext of peremptory strikes. One of the factors identified in *Miller El-II* was a history of systematically excluding minority jurors. 545 U.S. at 263-64. The facts in *Miller-El II* illustrated this factor by way of a twenty year-old formal policy of excluding minorities that had been adopted by a district attorney's office. *Id.* at 263-64. "A manual entitled 'Jury Selection in a Criminal Case' [sometimes known as the Sparling Manual] ..." which "was distributed to prosecutors" and "available to at least one of the prosecutors in Miller-El's trial." *Id.* at 264. The fact that the Sparling manual was available to at least one of the prosecutors at trial made it evidence of pretext.

With respect to *Miller-El II*, the state supreme court stated that:

> The evidence of a specific policy of past discrimination in *Miller–El II* significantly differs from the evidence before the Court.... The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller–El II*. *Miller–El II*, 545 U.S. at 266, 125 S.Ct. 2317 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror.").

*Flowers VI(B)*, 240 So.3d at 1124 (¶ 110).

The Mississippi Supreme Court did not dismiss *Miller-El II*, as Petitioner contends. It reviewed the record and found the evidence in this case significantly differed from the evidence in *Miller-El II*. The court also failed to find evidence that demonstrated the prosecutor's past

adjudications tended to show that, in this case, the five prospective African-American jurors peremptorily struck on the basis of race. In addressing his *Batson* claim, the Mississippi Supreme Court clearly stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124 (¶ 111).

**C. The circumstantial evidence in this case**

Petitioner attempts to calls the majority's finding, that the prosecutor's adjudications in other cases do not undermine the race neutral reasons in this case, into question. He argues the majority could have, but chose not to comply with the Court's GVR or make an effort to discern guidance from *Foster* in reconsidering his *Batson* claim. (Pet. for Cert. at 19). According to Petitioner, the majority's decision in *Flowers VI(B)* is nothing more than an attempt to save face and avoid embarrassment. (Id.). Respondent sees things differently.

First, the majority made the observation that *Foster* did not involve a particular prosecutor's history of adjudicated *Batson* violations for a reason. *Foster* is based on factual determinations of evidence that demonstrated the reasons given for four strikes were baseless, inconsistent with the facts in the record, and could not be credited. *Foster*, 136 U.S. at 1747. *Foster*, like *Miller-El II*, is a collateral review case, which permits evidence outside the record on appeal to be considered, unlike this case. "*Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's troubling jury selection file, which had a shocking focus on race." *Flowers VI(B)*, 240 So.3d at 1118 (¶ 87).

Even so, the Mississippi Supreme Court looked to *Foster* for guidance in considering "other

issues that might place our original opinion in *Flowers [VI]* in error." *Id.* Petitioner argues the majority's conclusion, that the prosecutor's adjudications do not undermine the race-neutral reasons, is illogical. If Petitioner were correct, arguably the prosecutor's adjudications would disqualify from participating in jury selection. Petitioner also suggests that the prosecutor's adjudications in this case are more "despicable" than *Foster's*, even though there is no evidence in *Flowers II* or *Flowers III* that is remotely similar to the evidence developed in *Foster* or *Miller-El II*. Considering all circumstances that may have a bearing on the issue of racial animosity into account, it cannot be said that the prosecutor's prior adjudications—in other cases—*prove* he has purposefully discriminated in this case. They may raise suspicions, but do not show purposeful discrimination similar to that in *Foster* or *Miller-El II*. This is the approach the majority took in reconsidering Petitioner's *Batson* claim, and rightfully so.

**II. The Mississippi Supreme Court correctly decided Petitioner's *Batson* Claim.**

Petitioner claims the Mississippi Supreme Court's consideration of his *Batson* claim was outcome determinative due its dismissal of the prosecutor's history. He contends that, when the evidence in this case is viewed cumulatively and in light of the prosecutor's history, discriminatory pretext of the five peremptory strikes is obvious. In support, he adopts the evaluation in Justice King's dissenting opinion and discusses the evidence in this case, which he believes establishes three of the five factors identified in *Miller-El II*. (Pet. for Cert. at 20-28).

It is worth noting that Petitioner's assertion, that the Mississippi Supreme Court dismissed the prosecutor's history in evaluating his *Batson* claim, is inconsistent with the plain language of majority opinion in *Flowers VI(B)*. After quoting various portions of the record on appeal in this case and concluding the prior adjudications did not undermine the race-neutral reasons given in this

case, the Mississippi Supreme Court clearly stated: "We do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1122-24 (¶¶ 106-111).

First, Petitioner attempts to show the majority opinion in *Flowers VI(A)* and *Flowers VI(B)* failed to consider all relevant circumstances in this case. In doing so, Petitioner cites three of five, non-exhaust factors this Court identified in *Miller-El II*. 545 U.S. at 240-66. He begins with a discussion of his *prima facie* case.

### A. *Prima Facie* Case

The first factor this Court considered in *Miller-El II*, was the total number of strikes used against a minority group and the effect on the venire. *Id.* at 241 (quoting Miller-El I, 537 U.S. at 342). The venire in *Miller-El II*, consisted of 108 jurors; twenty were African-Americans. *Id.* at 240. Nine of the twenty were removed for cause, which left eleven prospective African-American jurors prior to the peremptory strikes phase. *Id.* at 240-41. The prosecution struck ten of the eleven, excluding 91% of the qualified prospective African-American jurors. *Id.* The Court found the statistical data suggested disparate treatment. "'The prosecutors used their peremptory strikes to exclude 91% of the eligible African–American venire members.... Happenstance is unlikely to produce this disparity.'" *Id.* (quoting *Miller-El I*, 537 U.S. at 342).

In contrast, the prosecution's use of peremptories in this case was significantly and statistically lower than *Miller-El II*. When voir dire began on June 7, 2010, the venire was comprised of 67 African-Americans and 89 whites—42% African-American and 55% white. (CP vol. 22 at 3002); *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104). On June 10, 2010, after conducting

group and individual voir dire and excusing members for cause, 19 prospective African-American jurors remained at the beginning of the peremptory strike phase. (Id. at 3002-04); *Flowers VI(B)*, 240 So.3d at 1122 (¶ 104). The State exercised 5 strikes against prospective African-American jurors at an exclusion rate of approximately 26%—a significantly and statistically lower rate that *Miller-El II's* 91% rate and *Foster's* 100% rate.

Justice King, in his dissenting opinion, takes issue with the dramatic shift in the composition of the venire. He asserts, "These numbers, however, reveal a clear pattern of disparate treatment between white and African–American venire members." *Flowers VI(B)*, 240 So.3d at 1161 (¶ 228) (KING, J., dissenting). But unlike the majority opinion, Justice King's dissent makes absolutely no reference to the record on appeal. The record contains multiple instances, some of which are quoted in the majority opinion, that show the prosecution had nothing to do with this shift in the venire's composition. The most detailed and in-depth discussion on this point appears in the trial court's Opinion, denying Petitioner's Motion for JNOV, or in the Alternative for a New Trial. In that Opinion, the trial court discusses the venire's composition and the reasons for this shift in considerable detail. (CP vol. 22 at 3002-06). The trial court ultimately concludes: "It is clear from the record that most of the African Americans that were excused for cause, were excused because they were either related to [Petitioner] or were friends with him of with various members of his family." (Id. at 3005; Trial Tr. vol. 35 at 1739; 1787-89); *Flowers VI(B)*, 240 So.3d at 1122-24 (¶¶ 106-09).[7]

Respondent submits the dramatic shift in the venire had nothing to do with the prosecution

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[7] The cited portions of the Trial Transcript are two instances where the trial court addresses this very argument. Both are quoted in the majority opinion in *Flowers VI(B)*.

as evidenced by the facts contained in the record on appeal. Further, Respondent submits the statistical data, concerning the prosecution's use of peremptory strikes, is significantly and statistically lower than *Miller-El II* and *Foster*. This data in no way supports an inference of pretext.

**B. Disparate questioning**

Petitioner and the dissent in *Flowers VI(B)* also take issue with the number of questions asked of African-Americans compared with the number of questions the prosecution asked of white jurors. (Pet. for Cert. at 22-25). He cites a portion of Justice King's dissent as the approach the majority should have taken in evaluating his *Batson* claim. (Id.). Looking there, Justice King's dissent notes that, during individual voir dire, the prosecution repeated questions the trial court had asked. *Flowers VI(B)*, 240 So.3d at 1161 (¶ 230). His assertion is not entirely true. During individual voir dire, the trial court corrected both parties. Specifically, it stated that:

> Well, both of you are continuing to repeat the very same questions that I've asked, and then you repeat them several different times. And there is no point in the length of time either side is taking. Out of – so far we have gotten one, two, three, four, five, six, seven. And nobody has changed – after I asked them questions, nobody so far as changed from what I originally asked.... I'm not singling out one side over the other. I am saying this to both sides.
>
> ....
>
> I want to make clear again, I am going to start cutting off in mid-sentence if counsel for either side continues to ask the same questions that I have asked. There does not have to be 10 or 20 questions following up what the Court has just asked if you are repeating the same questions over again. And you do not need to ask the question but one time, if you ask it at all.

(Trial Tr. vol. 31 at 1160-61; 1188).

In addition, Petitioner argues the majority opinion's view of disparate questioning was clearly erroneous and unduly deferential in the prosecution's favor. Both he and Justice King claim "that all African-Americans who were struck by the State were asked more than ten questions." But as the majority opinion points out, this is not supported by the record. *Flowers VI(B)*, 240 So.3d at

1125 (¶ 112). "For example, the State asked Carolyn Wright, an African American against whom the State exercised a peremptory strike, only three questions." *Id.* The record reflects that more questions were asked of prospective African-American jurors but only when where a potential juror's answers to voir dire questions were unclear or needed further elaboration. *Id.* Respondent submits both are neutral and necessary reasons, which are supported by the record. *Miller-El-II*, 545 U.S. at 255. "The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record." *Flowers VI(B)*, 240 So.3d at 1125 (¶ 114).

Petitioner concedes this point by acknowledging the prosecution asked more questions because "*more* African-American jurors knew the parties, *most* of the follow-up questions pertained to relevant matters, *more* questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty...." (Pet. for Cert. at 23). Nevertheless, he asserts the Mississippi Supreme Court, in disregarding the prosecutor's history, allowed the prosecution to ask "highly leading questions, plainly trolling for an excuse for a strike." (Id. at 25). He cites an exchange between the prosecutor and Diane Copper, a prospective African-American juror who stated she worked with one of Petitioner's sisters. (Pet. for Cert. at 25, n. 15). What he fails to mention is that Ms. Copper also worked with Petitioner's father. She knew Petitioner's mother. She also lived near the Flowers at one point. And while Ms. Copper stated she could be fair, she also stated that these factors could have an impact on her ability to objective consider the evidence. (Trial Tr. vol. 29 at 770-71; Trial Tr. vol. 30 at 926, 934, 970-74).

Petitioner also states that the prosecutor attempted to lead Ms. "Copper into admitting that her relationships with defense witnesses ..." would affect her judgment. (Pet. for Cert. at 25). The defense witnesses included Petitioner's mother, Lola Flowers, who Ms. Copper knew. When asked,

she that she would lean towards voting in favor of Petitioner's family. Ms. Copper also stated that "it's possible" the fact that she knew many of Petitioner's family members could affect her and make her "lean toward [Petitioner]." (Trial Tr. vol. 33 at 1404-06). The prosecution asked if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" Ms. Copper answered, "Correct." (Id. at 1407).

Petitioner that states that prospective jurors Pamela Chesteen and Bobby Lester, had working relationships similar to Ms. Copper's relationship with Petitioner's sister. (Pet. for Cert. at 25, n. 15). At trial defense counsel attempted to argue disparate treatment based on the fact that the State accepted "almost every white juror who had some sort of connection to this case." However, defense counsel conceded that none of the white jurors struck worked with a member of Petitioner's family-as Copper did. The trial court, accordingly, rejected Petitioner's claim of disparate treatment:

> Also, she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationship with those two individuals in Mr. Flowers's family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the-S-6 with Ms. Copper and any white juror that was left on the panel."

(Trial Tr. vol. 36 at 1796-97).

It is also worth noting that Ms. Chesteen and Mr. Lester had relationships with or knew of John Johnson, former Winona chief of police and investigator for the district attorney's office. (Trial Tr. vol. 30 at 915; Trial Tr. vol. 31 at 1046-47). During jury selection, Petitioner informed the prosecution that he had subpoenaed Mr. Johnson with the intent of calling him as an adverse witness while attempting to rebut the prosecution's race-neutral reasons for using a peremptory strike against Carolyn Wright. (Trial Tr. vol. 1764, 1769-70). Petitioner argued, "No probing inquiry was made

by the State with respect to any of these [personal acquaintances and interrelationships with individuals who are witnesses in this case]. And we think it is, therefore, pretextual specific and particularly in light under -- of the history of race discrimination in jury selection in this district and in this particular case...." (Id. at 1764).

Additionally, the trial court addressed Petitioner's contentions with the prosecutor's questioning during voir dire in denying two of his motions, both of which were based "largely on the basis of the documented history" of "three trials of racial discrimination...." (Trial Tr. vol. 31 at 1096). In denying Petitioner's motions, the trial court stated:

> I am overruling on the idea of prosecutorial misconduct that would preclude them from seeking the death penalty, because there has been no showing that there was any prosecutorial misconduct. And again, the reason why they didn't seek the '07 death penalty then was because of an agreement between your office and them that if you didn't seek to have this expert on identification, they would not seek the death penalty. That was clear from the record back then. Also, I do not agree with your characterization that the State has made discriminatory questions today about -- during the jury selection. The State asked everybody what was on the panel if they had ever been sued by Tardy Furniture company. That did not single out a person that was black, a person that was white. They first asked if there was people that had charge accounts there. There were a number of white people and black that said they did. And then they asked if anybody had ever been sued. You know, I think it was two or three black jurors that said they had been. But that was not anything that was suggestively racist or racial in any way. So I do not see that their questioning today has had anything dealing with race. This case is not about black and white. It is right or wrong and guilt or innocence is what this case is about. And as I say, up to this point, I have not seen any issue that would indicate that there is anything discriminatory about any question that they have asked.
>
> Also, the case law at this point in this state is clear that, you know, you can exclude people under Witherspoon if they say they cannot consider under any circumstance the death penalty. If it disproportionally results in one group of people being excluded because of that, that is the law. And I'm sworn to uphold the laws of the State of Mississippi, and I do my dead level best to follow the precedents that have been set by the Supreme Court of Mississippi and the Supreme Court of the United States. And based on that, I do not see any merit to your motion. So it is denied.

(Id. at 1101-02).

Respondent submits the prosecution did not engage in disparate questioning of prospective African-American jurors. The facts in the record on appeal show that, while the prosecution asked more questions prospective African-American jurors, it did so when answers to questions were unclear or further elaboration was needed.

### C. Comparative juror analysis

Finally, Petitioner takes issue with the majority's review of the five individual African-American jurors who were struck. (Pet. for Cert. at 25-28). As before, Petitioner relies on the dissent's evaluation in an attempt to show the majority failed to consider all circumstances. (Id.). He argues the majority found no discriminatory pretext for the five peremptory strikes after reciting the race-neutral reasons given by the prosecutor and finding some evidence to support it. (Id. at 26). Respondent disagrees.

#### 1. Carolyn Wright

Petitioner focuses on the dissent's analysis of the prosecutor's race-neutral reasons as evidence that shows the majority failed to consider circumstances beyond what was proffered. (Id.). He relies on the portion of the dissent where Justice King discusses Ms. Wright's working relationship with Petitioner's father. (Id.). Justice King suggests the possibility, that Ms. Wright had little or no working relationship with Mr. Flowers, raises questions about the prosecutor's motive. (Id.). The problem here is: there were no white jurors who had ever worked with Mr. Flowers. The trial court made this finding with respect to Petitioner's contention:

> Wal-Mart here in Winona is not like some of these giant mega stores. It's a relatively small-smallest Wal-Mart, actually, that I know in existence. So she had worked with Mr. Flowers's father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State-the other jurors that have been tendered by the State-some of these, you know, white jurors

know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.

....

If-if the only reason the State offered was that she knows some of these Defense witnesses, then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

(Id. at 1773-75).

Carolyn Wright worked with Flowers's father at what the trial judge characterized as the "smallest Wal-Mart in existence." In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the defendant or a member of his family is a race-neutral reason for a strike. *See Manning v. State*, 735 So.2d 323, 340 (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family").

Petitioner also claims the majority's notation that "'on her juror questionnaire, Wright wrote that she had previously served as a juror in a criminal case involving the 'Tardy Furniture trial[,]'" cannot be considered evidence that will support a race-neutral reason. (Pet. for Cert. at 26, n. 16). Respondent disagrees. Under state law, a juror's history of litigation with any of the parties or their attorneys is, therefore, a race-neutral reason for a strike. *Webster v. State*, 754 So.2d 1232, 1236 (Miss. 2000). The majority was not imagining a reason for a strike. It cited evidentiary support for a reason given by the prosecution, which is consistent with this Court's precedent. *See Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (stating that the Ninth Circuit erred in reversing the trial court's determination of credibility when there was evidence, although not on the record, to support

the prosecutor's proffered reasons for the peremptory strikes).

Next, Petitioner cites the dissent where it calls attention to the white jurors' acquaintances with potential witnesses. (Pet. for Cert. at 27). As noted above, the critical distinction is the fact that Chesteen did not work with anyone in Petitioner's family, as Wright did. The trial court asked defense counsel if any white jurors tendered worked with Petitioner's father. Defense counsel responded, "no." (Id.). Petitioner argues that the majority initially discounted the fact that Chesteen knew potential witnesses only to later state this reason was a "convincing reason." He also questions the majority's failure to explain why it did not count the comparison as evidence of pretext. (Id., at 27, n. 17). It did. The majority specifically cited "*Hughes*, 90 So.3d at 626 (¶ 37) ('Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics of the challenged juror does not demonstrate that the reasons assigned are pretextual.')". *Flowers VI(B)*, 240 So.3d at 118. The majority's conclusion with respect to Ms. Wright's stated reason was that:

> Flowers's claim that the State provided "no convincing reasons" for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture. We also note that, on her juror questionnaire, Wright wrote that she previously had served as a juror in a criminal case involving the "Tardy Furniture trial." The State had multiple, credible, race neutral reasons for striking Wright, and the trial judge did not err in denying Flowers's *Batson* challenge as to the juror.

*Flowers VI(B)*, 240 So.3d at 1128 (¶ 121).

Finally, Petitioner takes issue with the fact that Ms. Wright, while sued by Tardy Furniture, did not have her wages garnished. According to Petitioner and the dissent, this was a significant mischaracterization that the majority blew-off as irrelevant. (Pet. for Cert. at 27, n. 18). In Mississippi, a juror's history of litigation with any of the parties or their attorneys is a race-neutral

reason for a strike. *Webster*, 754 So.2d at 1236. The majority acknowledged the mischaracterization, stating that: "Petitioner claims the State mischaracterized Wright's litigation with Tardy Furniture by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. However, that does not change the fact that being sued by Tardy Furniture was a race neutral reason for striking Wright. Prior litigation is a race neutral reason for a preemptive strike." *Flowers VI(B)*, 1127 (¶ 119).

Petitioner and Justice King find the garnishment problematic, because it "is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages." But in this case, litigation did not end in a settlement. Ms. Wright had a judgment entered against her, which was introduced into evidence during the *Batson* hearing as State's Exhibit 1. And Ms. Wright stated that she paid her debt. (Trial Tr. vol. 30 at 965). Again, Respondent submits the majority correctly concluded that the prosecutor offered race-neutral reasons, including the fact that Ms. Wright had been sued by Tardy Furniture.

Petitioner is correct in that the majority and dissent diverge in the analyses. But the majority's analysis is supported by the facts contained in the record on appeal. Furthermore, there is nothing that suggests that majority's decision to affirm is clearly erroneous. The majority correctly deferred to the trial court. And Respondent submits there was no *Batson* violation in this case.

## CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

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No. 17 - 9572

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CURTIS GIOVANNI FLOWERS,

*Petitioner*,

-vs.-

STATE OF MISSISSIPPI,

*Respondent*.

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# PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT IN REPLY ..... 1

I. Doug Evans had a proximate, adjudicated history of race discrimination ..... 1

II. Neither the trial court nor the Mississippi Supreme Court evaluated the credibility of Evans' proffered race-neutral reasons in light of his history of discrimination ..... 4

A. The trial court's failure to consider Evans' history ..... 4

B. The Mississippi Supreme Court majority's dismissal of Evans' history ..... 6

III. *Batson* and *Miller-El*, as well as this Court's GVR in light of *Foster*, require consideration of Evans' history of discrimination ..... 8

A. Respondent's false dichotomy ..... 8

B. Respondent's distinction of *Miller-El* and *Foster* ..... 11

C. Respondent's failure to offer a plausible alternative explanation for the GVR in this case ..... 13

IV. The lower court's dismissal of the prosecutor's history of discrimination was outcome-determinative ..... 15

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

**FEDERAL CASES**

*Batson v. Kentucky*, 476 U.S. 79 (1986). . . . . passim

*Currie v. McDowell*, 825 F.3d 603, 610 (9th Cir. 2016). . . . . 12

*Eddings v. Oklahoma*, 455 U.S. 104 (1982). . . . . 6

*Flowers v. Mississippi*, 136 S.Ct. 2157 (2016). . . . . 1

*Foster v. Chatman*, 136 S.Ct. 1737 (2016). . . . . 7, 15

*Hernandez v. New York*, 500 U.S. 352 (1991). . . . . 11

*Johnson v. California*, 545 U.S. 162 (2005). . . . . 9

*McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). . . . . 12

*Miller-El v. Dretke*, 545 U.S. 231 (2005). . . . . 10, 11, 12

*Morgan v. Illinois*, 504 U.S. 719 (1992). . . . . 6

*Snyder v. Louisiana*, 552 U.S. 472 (2008). . . . . 10

*Witherspoon v. Illinois*, 391 U.S. 510 (1968). . . . . 6

**RULES**

Fed. R. Evid. 609(a)(2). . . . . 10

**STATE CASES**

*Flowers v. State*, 158 So.3d 1009 (Miss. 2014). . . . . passim

*Flowers v. State*, 240 So.3d 1082 (Miss. 2017). . . . . passim

*Flowers v. State*, 947 So.2d 910 (Miss. 2007). . . . . 2

## ARGUMENT IN REPLY

Respondent's Brief in Opposition ("BIO") appears to advance three main claims aimed at avoiding further scrutiny following this Court's GVR in *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016): *First*, that prosecutor Doug Evans had no history of discrimination; *second*, that the Mississippi courts actually considered Evans' history of discrimination; and *third*, that the Mississippi courts were not obligated to consider his history of discrimination.[1] The record belies the first two claims, and the third is wrong as a matter of law.

Before turning to those three arguments, it is important to acknowledge what Respondent does *not* contest: In his first four prosecutions of Flowers, Evans literally could not have removed more qualified African American jurors than he did; he struck all ten (10) African Americans who came up for consideration at Flowers' first two trials, and he used all twenty-six (26) of his allotted strikes against African Americans at the third and fourth trials.[2]

### I. DOUG EVANS HAD A PROXIMATE, ADJUDICATED HISTORY OF RACE DISCRIMINATION.

In a novel departure from its past arguments, Respondent now suggests Doug Evans did not

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[1] Respondent also asserts that Flowers failed to establish a *prima facie* case of discrimination. BIO 25-27. No reviewing court or judge has agreed with that assertion, which is plainly wrong. Flowers, who is African American, cited the fact that Evans had struck five out of six African American jurors. This does not prove purposeful discrimination, of course, but it constitutes a *prima facie* case.

[2] The jury at the fifth trial, for which strike information is not in the record, was hung by African American jurors. Respondent argues that the fact that accusations were made against these jurors (neglecting to note that charges against Juror Bibbs were subsequently dropped) is among the facts that somehow "significantly undermine, if not wholly discount, [Flowers'] *Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] claim." BIO 21. Flowers is at a loss to understand how these facts-or his decision not to seek a change of venue at one of his trials, also cited as "undermining" his *Batson* claim, *id.*-have any bearing at all on the likelihood that Evans' stated reasons for striking African-American jurors at the sixth trial were pretextual.

actually discriminate when he used all fifteen (15) of his peremptory strikes against African Americans during his third prosecution of Flowers.[3] According to Respondent, the four dissenters in *Flowers III* were right-and the plurality opinion was merely the opinion of four judges who had a different view. *See* BIO 5. This assertion conveniently fails to report either the characterization of the violation by the plurality opinion, or the reasoning of the fifth justice, who concurred in the judgment reversing the conviction. In *Flowers III*, Justice Graves, "for the Court," *Flowers v. State*, 947 So.2d 910, 915 (Miss. 2007), declared that the jury selection record presented "as strong a *prima facie* case of racial discrimination as [it] ha[d] ever seen in the context of a Batson challenge." *Id.* at 935. His opinion went on to characterize Evans' conduct as "evinc[ing] an effort by the State to exclude African Americans from jury service," *id.* at 937. Justice Cobb, concurring in the judgment, without explanation stated that he thought the case was not "reversible on the Batson issue alone," but praised the plurality's "very thorough and instructive analysis of the Batson process, which should be useful, not only to the prosecutors who will be trying this case upon remand, but also to all prosecutors and defense attorneys alike, as they engage in future jury selection arguments." *Id.* at 939 (emphasis added). Notably, while the majority in *Flowers v. State*, 240 So.3d 1082 (Miss. 2017) (*Flowers VI(B)*) dismissed the import of the *Flowers III* holding that Evans discriminated in the exercise of his peremptory challenges, it did not dispute that *Flowers III* had so held. Thus, contrary to Respondent's assertion, a majority of the Mississippi Supreme Court did find that Evans had discriminated on the basis of race in the exercise of peremptory challenges in a prior prosecution of Flowers for the same offense.

Equally importantly, Respondent completely omits the additional fact that *Flowers III* was

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[3] Respondent did not make this argument in response to Flowers' first petition for certiorari.

not the only time a court adjudicated Doug Evans to have purposefully discriminated on the basis of race. The trial judge in *Flowers II*—who was not the same judge who presided over subsequent retrials—had previously found Evans to have discriminated in that trial, and responded by seating one of the African American jurors Evans had struck. While the Mississippi Supreme Court majority acknowledged that fact in *Flowers VI(B)*—albeit without affording it necessary weight in the *Batson* analysis-Respondent's BIO simply obscures it behind a misquotation of the majority's opinion.[4] Thus, Evans was not once but twice adjudicated to have discriminated in the use of his peremptory challenges.

Evans' history of discrimination was extraordinarily proximate and consequently, probative; both instances occurred in trials of the same defendant for the same offense. Importantly, as *Flowers III* makes plain, Evans did not abjure racial motivation after the first adjudication of discrimination. True, as Respondent points out, *Flowers VI* occurred many years after *Flowers III*, but nothing in the interim suggests that Evans had reformed. He tried Flowers twice between trials three and six, in the fourth using all his peremptory challenges against African Americans. In the fifth, the record on appeal does not reflect the racial distribution of his strikes, but does reflect that the two African Americans who made it onto the jury caused the jury to hang; such an outcome would not justify discrimination, of course, but it certainly would enhance the motive to discriminate for one who was-as Evans had demonstrated himself to be-willing to discriminate. Evans has never expressed remorse for his prior unconstitutional conduct and mendacity, and never has claimed to have changed

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[4] Respondent's BIO misquotes the *Flowers VI(B)* majority opinion, omitting a critical "s" and leaving the impression that the majority acknowledged prior discrimination at only one "trial." BIO 19. The relevant portion of the majority opinion actually reads: "[T]he trial court certainly considered circumstances surrounding the previous trials as evidenced by its response to Flowers' *Batson* claim[.]" *Flowers VI(B)*, 240 So.3d at 1123 (emphasis added).

his ways. In short, there is no reason to believe Evans' willingness both to discriminate and to mask his discrimination with pretextual explanations disappeared sometime between *Flowers III* and *Flowers VI*.

## II. NEITHER THE TRIAL COURT NOR THE MISSISSIPPI SUPREME COURT EVALUATED THE CREDIBILITY OF EVANS' PROFFERED RACE-NEUTRAL REASONS IN LIGHT OF HIS HISTORY OF DISCRIMINATION.

Respondent's insistence that both the trial court and the Mississippi Supreme Court majority did consider Evans' history is belied by the record and the ordinary meaning ascribed to the word "consider."

### A. The trial court's failure to consider Evans' history.

The BIO contains a curious statement: "Respondent submits the record on appeal, as evidenced by the majority opinion in *Flowers VI*, is replete with instances where the trial court heard, considered, and rejected Petitioner's argument that the prosecutor's history must be considered under the totality of the circumstances." BIO 19. Read literally, this sentence seems to concede the very point Flowers' petition presses: That the trial court rejected the argument that Evans' history "must be considered." Perhaps this is an error, and what Respondent meant to say is that the record is "replete with instances where the trial court" did consider that history, as Flowers had urged. But if that is what Respondent meant to say, its statement lacks any support in the record.

The record definitely is not "replete with instances" where the trial court *in fact* considered Evans' history; indeed, it lacks even a single instance of such consideration. Respondent recites the *Flowers VI(B)* majority's assertions that "Flowers' counsel ensured that the trial court consider [sic] the totality of the circumstances, including historical evidence of racial discrimination by the district attorney," and that "the trial court certainly considered circumstances surrounding the previous

trial[s]." *Flowers VI(B)*, 240 So.3d at 1123; BIO 19. However, as detailed in Flowers' petition, the majority's only purported support for this claim was four *arguments made by defense counsel* that address the prior history of discrimination; the two quoted trial court responses to those arguments reflect absolutely no "consideration" of that history. *See* Pet. for Cert. at 17-18.[5]

Thus, neither the *Flowers VI(B)* majority nor Respondent cite any evidence that the trial court, when assessing the credibility of Evans' proffered reasons, in any way considered his history as a repeat offender of *Batson*'s commands. Respondent's assertion that "Petitioner made certain that the trial court considered the prosecutor's history," tortures the meaning of "consider," for nothing in the trial judge's statements during the *Batson* hearing plausibly can be read either as weighing the history of discrimination, or as considering other evidence of discrimination in light of that history. Clearly the trial judge was *presented* with that history, but there is zero evidence that

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[5] Respondent claims to correct Flowers' assertion that, with respect to one of the purported "responses" by the trial judge quoted by the majority, "the trial court's statement was actually made before the argument was." Pet. for Cert. at 18. But in fact, Respondent is incorrect in asserting that language quoted by the state court majority "responded" to the language it quoted from trial counsel's argument during the *Batson* hearing regarding the relevance of Evans' history. As is clearly evident from the transcript's pagination and headings, the state court majority quoted the responses that defense counsel made during the *Batson* hearing, and then cited as the trial court's "response," remarks made by the trial court during the prior hearing on challenges for cause. *Compare Flowers IV(B)*, 240 So.3d at 1123 (quoting defense counsel at Tr. 1764-65; Tr. 1766-67; Tr. 1788-89) with *Flowers IV(B)*, 240 So.3d at 1123-24 (quoting the trial judge at Tr. 1738-39). Respondent, rather than quoting the language quoted by the court, obfuscated this issue by quoting a *different* statement made by trial counsel; this argument (unlike the one quoted by the *Flowers VI(B)* majority) was indeed made before the trial court's comments, but it was not made during the course of the *Batson* hearing; rather, as the transcript heading indicates, during the hearing on "Challenges for Cause." (Tr. 1733-34). This manufactured tempest in a teapot about timing obscures what the BIO does not address: Neither the *Flowers VI(B)* majority nor Respondent could find *anything* in the trial court's statements that reflects its own consideration of the probative value of Evans' prior discrimination in assessing the credibility of his proffered reasons.

he was willing to, or did, *consider* it.[6]

### B. The Mississippi Supreme Court majority's dismissal of Evans' history.

When first evaluating the evidence that Evans discriminated in selecting the jurors who would serve in Flowers' sixth trial, the Mississippi Supreme Court completely ignored Evans' prior record. *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI(A)*). Despite Flowers' briefing of the *Batson* issue, which addressed "the very proximate history of discrimination" as the first indicium of discrimination to be considered, and despite the three dissenters' specific protest that the majority's failure to take account of history in this case was contrary to Batson's direction that "all relevant circumstances" must be considered, *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted), the majority failed to dispute the charge that it had disregarded probative history, failed to even mention the adjudicated racial discrimination in its discussion of Flowers' *Batson* claim, and even omitted prior history of discrimination in its recitation of the factors this Court had instructed were relevant in evaluating pretext. *Flowers VI(B)*, 240 So.3d 1121 (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1047 (internal citations omitted). When this Court GVRed the decision in *Flowers VI(A)* for "reconsideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016)," one member of the *Flowers VI(A)* majority, Chief Justice Waller, did reconsider his

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[6] A distinction between what an advocate presents and what a decisionmaker considers is not novel. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing death sentence where defense proffered numerous mitigating factors and sentencer refused to consider all but one of the proffered factors). Nor is the distinction one-sided. *Compare Witherspoon v. Illinois*, 391 U.S. 510 (1968) (although state may not exclude all jurors who are opposed to the death penalty, it may exclude those who are unwilling to consider state's argument for imposing it in a particular case) *with Morgan v. Illinois*, 504 U.S. 719 (1992) (state may not seat a juror who will not consider mitigating evidence, but will automatically vote for death).

prior decision, and in *Flowers VI(B)* joined Justice King's dissent. The majority, however, rather than reconsidering, instead chose to defend their decision not to do so.

Respondent asserts that the majority did reconsider its decision, but the only language from the majority's opinion that it cites is evidence to the contrary. Respondent claims that the Mississippi Supreme Court reviewed the record for evidence of "exceptional circumstances" and failed to find such circumstances. BIO 20. However, at no point did the majority opinion discuss the presence or absence of exceptional circumstances. Moreover, as discussed in the Petition, the majority presented arguments that *Foster* was not relevant to its decision, which hardly suggests receptivity to reconsideration. Respondent quotes the majority's claim that they "do not ignore the historical evidence of racial discrimination in previous trials in our consideration of [Flowers'] arguments." BIO 20. That sounds well and good, but in the very next sentence, the majority immediately makes clear that while they are no longer "ignor[ing]" that evidence, neither are they willing to consider it: "However, the historical evidence of past discrimination presented to the trial court *does not alter our analysis as set out in Flowers VI[(A)]*." *Flowers VI(B)*, 240 So. 3d at 1124 (emphasis added). Respondent makes no attempt to explain how this sentence can be squared with willingness to "consider" Evans' recidivist history of discrimination. And if the quoted sentence leaves any doubt at all that the *Flowers VI(B)* majority was not going to consider the evidence as it bore on Evans' credibility, that doubt is resolved by the ensuing analysis of the evidence of discrimination, which is a nearly *verbatim* copy of the *Flowers VI(A)* opinion containing not a single mention of Evans' history. Respondent makes no attempt to explain how a court willing to reconsider its prior decision in light Evans' history would repeat its prior analysis word for word, when that analysis contained no mention of history.

Thus, nowhere in the trial court's opinion, the *Flowers VI(B)* majority opinion, or the BIO is there an evaluation of the likelihood that Evans would do what he had done-at least twice-before, nor is there any consideration of the other evidence of discrimination in light of what Evans had shown himself willing to do.

## III. *BATSON* AND *MILLER-EL*, AS WELL AS THIS COURT'S GVR IN LIGHT OF *FOSTER*, REQUIRE CONSIDERATION OF EVANS' HISTORY OF DISCRIMINATION.

Respondent's rewording of the question presented ("Whether the Mississippi Supreme Court committed reversible error in considering a prosecutor's history of adjudication . . .") implies that the lower court *did* consider the prosecutor's history of discrimination, but, as discussed above, the majority's opinion does not reflect any such consideration. Perhaps recognizing the lack of support in the record for its assertions that the Mississippi Supreme Court majority had considered Evans' history, Respondents also present an odd collection of arguments-all demonstrably wrong-that it ***should not*** have done so.

### A. Respondent's false dichotomy.

Respondent claims that Flowers "asks this Court to assume the prosecutor violated *Batson* in this case because the prosecutor was found . . . to have violated *Batson* in *Flowers III*." BIO 20. Flowers is asking no such thing.[7] Respondent even posited Flowers' petition implies that a

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[7] Flowers' Petition explicitly disavowed that extreme, and obviously erroneous, argument:

> As the dissenters carefully noted, "On its own, [Evans' prior history of discrimination] is not dispositive of a finding of racial discrimination." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

Pet. for Cert. at 21.

prosecutor with a history of discrimination would be disqualified from participating in jury selection. It does not.[8] Respondent claims that Flowers' arguments are inconsistent with this Court's *Batson* jurisprudence because that jurisprudence recognizes that the "burden of persuasion rests with, and never shifts from, the opponent of the strike." BIO 20-21 (citing *Johnson v. California*, 545 U.S. 162, 171 (2005)). Flowers, however, has never disputed that the burden of persuasion always rests with the opponent of the strike. Ultimately, Respondent caricatures Flowers' arguments, posing a false dichotomy: Either Evans' prior history of discrimination is dispositive or it may be completely disregarded.

Respondent's concentration only on these extremes obscures the obvious middle course compelled by this Court's *Batson* jurisprudence and basic principles of credibility-assessment. If a prosecutor offers facially race neutral reasons for his or her strikes, *Batson*'s third step requires a reviewing court to determine whether to credit those reasons, or to deem them pretextual. And in making that credibility determination, this Court has held that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) ("*Miller-El II*")). Among the factors this Court has found to "bear upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El II*, 545 U.S. at 240; "side-by-side comparisons of some black venire panelists who

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[8] On the contrary, Flowers' Petition maintains:

> Evans could have—and *should* have—learned the constitutional mandate of racial neutrality from the Mississippi Supreme Court's rebuke in *Flowers III*, even though he clearly had not learned it from the trial court's finding of discrimination in *Flowers II*. Another prosecutor might have. But Evans did not.

*Id.*

were struck and white panelists allowed to serve," *id.* at 541; "contrasting voir dire questions posed respectively to black and nonblack panel members," *id.* at 255; and mischaracterization of the evidence, *id.* at 244; and a history of racial discrimination by the prosecuting office, *id.* at 266.

Respondent argues that Flowers "does not explain how the prosecutor's history of adjudicated *Batson* violations constitute [sic] substantial case-specific evidence that demonstrates any of the prosecution strikes against the prospective African American jurors should not be credited." BIO 21. If Respondent means that the history alone does not discredit all possible strikes, Flowers has not offered an explanation of how that is true-but also does not *claim* that it is true. Rather, Flowers has insisted that Evans' history must be *considered* in evaluating his *credibility*, and that his history weighs against crediting his stated reasons. For that modest proposition, Flowers offered ample explanation in his Petition. Pet. for Cert. at 10-11; 29-30.

The shortest explanation of the relevance of Evans' history was offered by the three dissenters below: "If the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of the *same prosecutor in the retrial of the same case* is a legitimate consideration." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted). Flowers also provided a more expanded explanation, Pet. for Cert. at 10-11; 29-30, which may be summarized as follows: The object of step three's multi-factor inquiry is to determine whether the prosecutor's proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). Both law and life teach that in determining the likelihood of disputed honesty, a history of dishonesty on a closely related issue is highly probative. *See, e.g.*, Fed. R. Evid. 609(a)(2) (mandating admissibility of evidence of a prior conviction for use in

"attacking a witness's character for truthfulness" where the "elements of the crime required proving . . . a dishonest act or false statement").

### B. Respondent's distinction of *Miller-El* and *Foster*.

The *Flowers VI(B)* majority opinion attempts to distinguish both *Foster* and *Miller-El*, the former on the grounds that "Foster in no way involved a particular prosecutor's history of adjudicated *Batson* violations," *Flowers VI(B)*, 240 So.3d at 1118, and that "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124. As Flowers' petition points out, there is no apparent reason to find the jury selection file in *Foster* more morally despicable than an adjudicated history of repetitive, actual race discrimination. Similarly, the *Flowers VI(B)* majority addresses Flowers' contention that *Miller-El II*, compelled consideration of Evans' history, but rejected the comparison, stating: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124 (citing *Miller-El II*, 545 U.S. at 266). But again, as both Flowers' petition and the dissenting opinion point out, the majority opinion offers no explanation for why the policy of an *office*—adopted when that policy had not yet been declared unconstitutional—would be more probative of willingness to lie and/or willingness to violate the Constitution than would be the prior adjudicated, repeated, unconstitutional discrimination of the *individual* whose credibility was at stake. Pet. For Cert. at 18-19; *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted); *see also*, *Currie v. McDowell*, 825 F.3d 603, 610-11, 613 (9th Cir. 2016) (holding that the prosecutor's history of

*Batson* violations supports a finding of pretext because "[i]n this instance, it is not only the same office, but the same prosecutor, who brings a history of *Batson* violations with him"); *McNair v. Campbell*, 416 F.3d 1291, 1312 (11th Cir. 2005) (noting that a history of discrimination in the district attorney's office was insufficient to prove a *Batson* violation because the defendant "failed to connect any conduct criticized in the cited cases to [the defendant's] own prosecutor, much less his conduct in this case.").

Respondent repeats these purported distinctions without providing the missing explanation for either the strange moral comparison between the evidence in *Foster* and the evidence of Evans' repeated, adjudicated discrimination, or the counter-intuitive probativeness comparison between the historical evidence in *Miller-El* and the historical evidence presented by Flowers. The absence of that explanation is no accident.

Respondent also offers another distinction, equally unfounded. According to Respondent, *Miller-El* and *Foster* are distinguishable because both, unlike *Flowers VI*, were post-conviction cases. This third factual difference, like the two relied upon by the Mississippi Supreme Court majority, has no bearing on the necessity of considering the history of discrimination. According to Respondents, "*Foster*, like *Miller-El II*, is a collateral review case, which permits evidence outside the record on appeal to be considered, unlike this case." BIO 23; see also, id. at. 17 ("*Foster* involves evidence that was developed after trial . . . ."). This is a true statement, but an irrelevant one. Flowers does not and need not rely on evidence "outside the record on appeal." Evidence of Evans' history of discrimination is contained in the record on appeal. The fact that Evans' behavior occurred prior to the trial in *Flowers VI* is no less relevant on direct appeal than it would be on collateral review. Evidence *discovered* after trial is not cognizable on direct appeal, but Flowers

does not rely on such evidence. Neither the trial court nor the Mississippi Supreme Court has ever suggested that Flowers failed to comply with Mississippi procedural requirements in his reliance on Evans' history. It would be remarkable to disfavor presentation of available evidence of discriminatory purpose at the earliest opportunity, and Respondent cites nothing in *Miller-El* or *Foster* that supports disregarding evidence that was presented to the factfinder.

### C. Respondent's failure to offer a plausible alternative explanation for the GVR in this case.

Like the *Flowers VI(B)* majority, Respondent provides a lengthy description of *Foster*'s facts. Citing Justice Alito's dissent, Respondent further claims that *Foster* "did not change the applicable principles for analyzing a *Batson* claim," BIO 16, apparently in service of its argument that the GVR required nothing of the Mississippi Supreme Court. However, Respondent has offered no theory of why this Court GVRed this case for reconsideration in light of *Foster* (or for that matter, why the opinion of a Justice dissenting from a GVR should be the touchstone of the duty the GVR places upon the lower court).

Instead of presenting its own view of what the GVR required, Respondent invented and attributed to Flowers a position it could then attack. According to Respondent, Flowers' Petition insists that "to comply with the GVR" requires suspension of all deference to a trial court's determination. BIO 15-16. This assertion, however, sets up yet another straw man; Flowers' Petition nowhere claims that the GVR in light of *Foster* precluded according any deference to the trial court's determination. Rather, Flowers' Petition claims that the relevance of *Foster* lies in its statement that the third step of *Batson*—determination of whether facially neutral reasons are pretextual-"turns on factual determinations, *and in the absence of exceptional circumstances*, '[a

reviewing court should] defer to state court factual findings unless [it] conclude[s] that they are clearly erroneous.'" *Foster*, 136 S.Ct. at 1747 (citing Snyder, 552 U.S. at 477) (emphasis added). Therefore, upon remand the Mississippi Supreme Court was obliged to focus on Evans' extraordinary history, the only "exceptional circumstance" that could have prompted this Court to GVR the case, and to reconsider the question of pretext in light of those circumstances to avoid a "clearly erroneous" result.

It is not that no deference is due the trial court's determination, but that the presence of exceptional circumstances lessens the deference due the trial court. Why would a history of discrimination in the exercise of a prosecutor's peremptory challenge constitute an exceptional circumstance? Because ordinarily, demeanor is extremely probative of credibility, more probative than a cold review of the record; consequently, in ordinary circumstances, only where a trial judge's credibility determination is "clearly erroneous" should it be overturned. But it is not always the case that demeanor is the best evidence of credibility. Evans' prior history of at least twice discriminating in the exercise of his peremptory challenges confirmed not only his willingness to violate the law, but equally importantly, his willingness to offer pretextual race-neutral reasons to cover his violations. *That* willingness was at least as probative of the credibility of subsequent facially race-neutral reasons as was Evans' demeanor. Indeed, given the prior finding in *Flowers III* that the trial judge had erroneously assessed Evans' demeanor, crediting his stated reasons when they were in fact pretextual, Evans' demeanor seems to have been a decidedly poor indicator of pretext. Under these exceptional circumstances, lesser deference was due to the trial judge's determination, and consideration of the other evidence of discrimination in light of Evans' prior history was required.

## IV. THE LOWER COURT'S DISMISSAL OF THE PROSECUTOR'S HISTORY OF DISCRIMINATION WAS OUTCOME-DETERMINATIVE.

The *Flowers VI(B)* majority opinion fails to lessen the deference due to trial court credibility determinations under ordinary circumstances, fails to evaluate the likelihood that Evans would do what he had done—at least twice—before, and fails to consider the other evidence of discrimination in light of what Evans had shown himself willing to do and say. Its assertion that "[t]he prior adjudications of the violation of *Batson do not undermine* Evans' race neutral reasons," *Flowers VI(B)*, 240 So.3d at 1124 (emphasis added), is simply wrong. Dispute over *how much* those adjudications undermine his reasons is possible, but this Court's precedents leave open no dispute over *whether* they weigh against the credibility of his stated reasons.

Respondent's BIO, like the *Flowers VI(B)* majority opinion, runs through Evans' stated reasons with no consideration of his history. It resolves all doubtful questions in favor of Evans, and ignores other evidence suggesting pretext, including disparate questioning, the strength of the *prima facie* case, comparative juror analysis, several mischaracterizations of the record, and a highly unusual out-of-court investigation of a juror's answers. Flowers' Petition examines in detail the evidence that points toward discriminatory purpose, looking at that evidence in light of Evans' prior willingness to discriminate and his prior willingness to dissemble regarding his discriminatory intent. As the Petition also sets forth, the three dissenters do the same, and conclude, considering the totality of the circumstances, that Flowers' evidence meets the burden of establishing pretext. It is telling that both the majority below and Respondent here refuse to undertake that consideration.

## CONCLUSION

WHEREFORE, for these additional reasons, this Court should grant certiorari.

Respectfully submitted,

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October 9, 2018

No. 17-9572

# In The Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,
*Petitioner,*

v.

STATE OF MISSISSIPPI,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

## BRIEF OF *AMICI CURIAE* THE MAGNOLIA BAR ASSOCIATION, THE MISSISSIPPI CENTER FOR JUSTICE, AND INNOCENCE PROJECT NEW ORLEANS

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## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. The Meager Case Against Flowers Should Have Invited Intense Scrutiny From the Jury ..... 3

A. The Evidence That Flowers Committed the Murders Was Questionable ..... 4

B. The Motive and Methods Ascribed to Flowers Are Implausible ..... 9

C. Evidence Pointing to Other Suspects Raises Reasonable Doubt of Flowers' Guilt ..... 11

II. Racial Division Isolates Black from White Citizens on the Tardy Furniture Murders ..... 13

A. Winona's History of Racial Conflict ..... 13

B. The District Attorney Customarily Practices Race Discrimination in Jury Selection ..... 18

C. Racial Tactics Were Used to Influence the *Flowers* Trials ..... 19

III. The Exclusion of Black Citizens From Flowers' Juries Diminishes Confidence in The Verdicts and Raises an Unacceptable Risk That an Innocent Man Has Been Convicted of Capital Murder ..... 25

CONCLUSION ..... 29

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## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

*Amici curiae* the Magnolia Bar Association, the Mississippi Center for Justice, and Innocence Project New Orleans respectfully submit this brief supporting the Petition for Writ of Certiorari filed by Curtis Flowers. [1]

## INTEREST OF *AMICI CURIAE*

**The Magnolia Bar Association**, organized in 1955 to address the demand of Blacks for first class citizenship in Mississippi, has over one hundred members. The Magnolia Bar is dedicated to empowering Black Mississippians to participate in the judicial system as lawyers, judges, and, in particular in this case, criminal trial jurors.

**The Mississippi Center for Justice (MCJ)**, a non-profit law firm committed to advancing racial and economic justice, advocates for low-income Mississippians and communities of color.

**Innocence Project New Orleans (IPNO)**, a non-profit law firm and founding member of the Innocence Project Network, has freed and/or exonerated 32 innocent prisoners in Louisiana and

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[1] Pursuant to Rule 37.2(a), *amici* have received written consent to the filing of this brief from all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission.

Mississippi. Five of the six Mississippi exonerees are Black. The National Registry of Exonerations reports fifteen out of eighteen Mississippi exonerees are Black.

*Amici* support full participation of citizens of color in criminal trial juries in Mississippi, and share an interest in preventing wrongful convictions of innocent men of color by juries from which citizens of color have been excluded. They therefore have an important perspective to offer the Court.

## SUMMARY OF ARGUMENT

The Fourteenth Amendment's equal protection guarantee forbids racial discrimination barring minorities from jury service. Such discrimination not only violates the rights of prospective jurors and criminal defendants, but also "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[2]

The prosecution of Curtis Flowers demonstrates these evils. The state's case was built on faulty eyewitnesses, improper forensics, and false confessions from untruthful informants – known causes of wrongful convictions.[3] Flowers' prosecution further divided an area long torn by racial conflict,[4] and the racial composition of the six trial juries correlates with each jury's decision.[5]

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[2] *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).
[3] Section I.
[4] Section II.A.
[5] Section II.C.

The District Attorney's racially discriminatory jury selection in Flowers' sixth trial was consistent with his practice.[6] Its goal was to empanel the highest possible number of white jurors to secure a guilty verdict despite the scant evidence of guilt. The plan succeeded. The jury (eleven white, one Black) returned a guilty verdict after thirty minutes' deliberation.

In a racially diverse community, discrimination in jury selection threatens the jury's ability to subject the prosecution's case to critical scrutiny, raising the risk of wrongful convictions.[7] *Amici* request this Court grant certiorari to strengthen the institution of the jury as an essential protection of innocent defendants.

## ARGUMENT

### I. The Meager Case Against Flowers Should Have Invited Intense Scrutiny From the Jury.

Known causes of wrongful convictions include faulty eyewitnesses, improper forensics, false confessions, and untruthful informants.[8] This case is infected with all four infirmities. The state's questionable case should have required intense

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[6] Section II.B.

[7] Section III.

[8] "The Causes of Wrongful Convictions," The Innocence Project, https://www.innocenceproject.org/causes-wrongful-conviction./ (last viewed July 22, 2018) (reviewing the first 325 prisoners exonerated by DNA evidence in the United States).

scrutiny by the jury. The rapid verdict displayed no such caution.

### A. The Evidence That Flowers Committed the Murders Was Questionable.

#### 1. The eyewitness testimony was unreliable.

This Court recognizes "[t]he vagaries of eyewitness identification."[9] Because memory depends on an individual's perception, "memories are not exact recordings of events,"[10] but imperfect recollections. "As a rule, the longer the time period between acquisition, retention, and retrieval, the more difficulty [people] have retrieving the memory."[11]

Here, purported eyewitness accounts were given weeks, if not months, later. And further, the location and timing of the witnesses' alleged sightings are incompatible.[12] Many witnesses lacked independent memory of the exact day they saw Flowers.[13]

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[9] *U.S. v. Wade*, 388 U.S. 218, 228 (1967); *see also Manson v. Brathwaite*, 432 U.S. 98, 111-12 (1977); *Perry v. New Hampshire*, 565 U.S. 228, 244-45 (2012).

[10] Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, FED. CTS. L. REV., June 2006, at 7.

[11] *Id.* at 10.

[12] Tr. 3189-95, 2289-90, 2221-22, 2302, 2045-46, 2312; Ex. S-128 at 1319.

[13] For example, Edward McChristian now states, "I wasn't even really sure [what I had seen]. [Law enforcement] had more about it than I did." This included the actual date on which McChristian saw Flowers, which was supplied to him by the investigator. *In the Dark: The Route*, AMERICAN PUBLIC MEDIA

Moreover, the state's eyewitnesses gave five irreconcilable descriptions of Flowers' clothing. For example, one described "some shorts [that] . . . were white,"[14] while another offered "black jeans [and a] white shirt."[15] When Flowers was detained on the day of the murders, he wore blue knee-length pants and a blue shirt.[16] No clothes belonging to Flowers matched any witness' description.[17]

Porky Collins, questioned six weeks after the murders, identified Doyle Simpson from a photo lineup as the man he saw on the street outside Tardy Furniture that day. Only when prompted during a second photo spread did Collins identify Flowers.[18]

Finally, many witnesses were incentivized by promises of reward and threats of reprisal. Nobody came forward until a $30,000 reward was posted nine days after the murders.[19] This reward was explicitly referenced to potential witnesses as an incentive.[20]

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(May 1, 2018), https://www.apmreports.org/story/2018/05/01/in-the-dark-s2e2) (last viewed July 16, 2018) [hereinafter *The Route*] at 28:00-31:30. *In the Dark* is a podcast by American Public Media, a group of nonprofit organizations that produces public radio programs. Organizational Structure, American Public Media, https://www.americanpublicmedia.org/about/org-structure/ (last viewed July 16, 2018).

[14] Tr. 1322.

[15] Tr. 2238.

[16] Tr. 2487.

[17] Tr. 2858-59.

[18] Tr. 3014-17; 72-73. Collins, who is white, originally had only reported the gender and complexion of the man he saw. Tr. 32.

[19] Ex. D-1, R.E. Tab 8; see also Tr. 1888. See also *The Route* at 15:15-15:45.

[20] In 1996, police took Latarsha Blissett from high school to the police station, where two investigators intimated she could

And several witnesses in the six trials reported being coerced by law enforcement.[21] This contradictory and incentivized testimony should have given the jury pause.

### 2. The state's forensic evidence was questionable and immaterial.

The investigation did not unearth DNA or fingerprints tying Flowers to the crime. No gun was found. The state's forensic evidence consisted of the results of a gunshot residue test, a bloody shoeprint found at the scene, and an attempt to match bullets found at the scene to a gun belonging to Flowers' cousin. This meager evidence demanded scrutiny.

A single particle of gunshot residue was detected on Flowers' hand. The state's technician acknowledged that the particle, by itself, did not bring the jury any closer to knowing whether its origin was firing a gun or another source of exposure.[22] Such

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receive the reward if she implicated Flowers. Blissett refused. *The Route* at 44:00-46:15. Blissett testified that Clemmie Flemming, a state eyewitness, admitted that she lied for the reward. *Flowers v. State*, 158 So.3d 1009, 1025 ¶ 14 (Miss. 2014).

[21] Nine months after the murders, Roy Harris was summoned by police and shown Flowers' picture. Harris denied seeing Flowers, but was intimidated into testifying otherwise. After the first trial, Harris recanted. *The Route* at 32:00-39:00. Another witness, Edward McChristian, also recounted being intimidated by investigators and supplied with details that he did not know otherwise. *The Route* at 28:00-31:30.

[22] Tr. 2630. Gunshot residue can transfer by contact with a contaminated person, a contaminated object, or from walking through a contaminated space. Lauren S. Blakey et al., *Fate and Behavior of Gunshot Residue – A Review*, J. OF FORENSIC SCI., Jan. 2018, at 9, 13.

other sources include the police car which carried Flowers to the station, or the station itself.[23] The particle's presence is also consistent with testimony that Flowers shot fireworks and worked on his car days before the crime.[24]

The state claimed a bloody shoeprint found at the scene was made by a Fila "Grant Hill" Size 10 ½ shoe belonging to Flowers. But the person who originally found the bodies did not see a shoeprint.[25] Neither did one of the first investigators on the scene.[26] It is therefore unknown whether the shoeprint was made during the crime or later that morning.

The store was unattended for almost an hour between the bodies' discovery and the arrival of law enforcement.[27] The store was open; anyone could have left a shoeprint or otherwise disturbed the scene.[28]

Moreover, scant evidence connected the shoeprint to Flowers. No shoes alleged to match the print were ever recovered. The state merely produced a shoebox from Flowers' girlfriend's home for the Fila brand shoe which allegedly made the shoeprint.[29] That box belonged to the girlfriend's son; Flowers's fingerprints were nowhere on it.[30]

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[23] Tr. 2630-32.
[24] *Flowers v. State*, 773 So.2d 309, 314 (Miss. 2000).
[25] Ex. S-127 22-24, 34.
[26] *Flowers VI*, 158 So.3d at 1025.
[27] Ex. S-127 at 8:6-7; Tr. 1834-35.
[28] See Tr. 2649.
[29] Tr. 2204-05.
[30] Tr. 2856, 2864, 2696.

The state never found a murder weapon. But they attempted to prove that a gun reported missing by Flowers' cousin (and alternate suspect) Doyle Simpson could be matched to bullets recovered from to the murder scene. A state's expert testified that bullets recovered from outside Simpson's house and Tardy Furniture were shot from a .380 semi-automatic and had characteristics of six lands with a right twist.[31] Although these are common characteristics,[32] the state used them to assert that the bullets were shot from Simpson's gun. On cross examination, the expert conceded that the bullets "could have come from a .380,"[33] and that "there are several thousands of those [.380 with six lands and a right twist] available."[34]

### 3. The jailhouse confessions are false.

In over twenty percent of known wrongful convictions, a "jailhouse snitch" testified that the defendant confessed.[35] Such testimony was the only direct evidence against Flowers.[36] Throughout the six trials, three separate jailhouse snitches testified; each has recanted.[37] Odell Hallmon, who testified in the

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[31] Tr. 2134-40.

[32] *See, e.g.*, https://www.bevfitchett.us/gunshot-wounds/the-forensic-aspects-of-ballistics-1.html (last reviewed July 24, 2018).

[33] Tr. 2156.

[34] Tr. 2157.

[35] Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1378 (2014).

[36] *Flowers v. State*, 158 So.3d 1009, 1039-40 (Miss. 2014).

[37] Hawkins recanted his testimony by affidavit in 2015; Veal admitted on tape to lying. *In the Dark: The Confessions,*

sixth trial, received leniency regarding his own criminal activity in exchange.[38] Hallmon admits now that "[Curtis Flowers] ain't never told me that [he committed the murders]. That was a lie. I don't know nothing about this shit. It was all make believe, everything was all make believe on my part."[39]

### B. The Motive and Methods Ascribed to Flowers Are Implausible.

#### 1. Motive

The prosecution argued that Flowers committed the murders in retaliation for losing his job. But Flowers worked at Tardy Furniture less than four days. After missing three days' work, Flowers was told his employment had ended, and that his paycheck would be docked to cover damaged

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AMERICAN PUBLIC MEDIA (May 15, 2018), at 20:00-21:25 https://www.apmreports.org/story/2018/05/15/in-the-dark-s2e4 (last viewed July 16, 2018). Veal described meeting with the Sheriff and the District Attorney to concoct his story. *Id.* at 7:00-15:55. After he agreed to cooperate, Veal was released from jail and his charges were dropped. *Id.* at 7:00-15:55.

[38] *In the Dark: Punishment*, AMERICAN PUBLIC MEDIA (May 29, 2018), at 8:00-13:35, https://www.apmreports.org/story/2018/05/29/in-the-dark-s2e6 (last reviewed July 16, 2018) [hereinafter *Punishment*]. *Id.* at 8:00-13:35; *In the Dark: Privilege*, AMERICAN PUBLIC MEDIA (May 22, 2018), at 11:45-12:30, 26:40-28:00, 38:13-40:40, https://www.apmreports.org/story/2018/05/22/in-the-dark-s2e5 (last reviewed July 16, 2018) [hereinafter *Privilege*]. One of the deputies who arrested Hallmon suspected some kind of deal, saying, "He worked out something with someone . . . 'cause he didn't stay in jail long." The deputy surmised that Hallmon's testimony against Flowers "helped him a lot out of some stuff." *Id.* at 16:00-17:20.

[39] *Punishment*, at 14:20-15:20.

merchandise.[40] No evidence showed that this decision upset Flowers.[41] Flowers did not experience financial hardship, receiving unemployment benefits both before and after his employment at Tardy.[42]

### 2. Knowledge of a Gun

The prosecution posited that Flowers set out in daylight to steal a gun from his cousin's car,[43] walked across town hours later to commit a quadruple homicide, and walked back home through town, still in daylight.[44]

No proof showed that Flowers knew where to find his cousin's gun. The cousin testified that he did not regularly keep a firearm in his car's glovebox,[45] and there "was no way that Curtis Flowers would have known the gun was in the car that particular morning."[46]

### 3. Manner of Killing

The murders were gravely efficient. Three victims were found within feet of each other;[47] two were shot once in the head each, and the other was shot twice.[48] The fourth victim was found some

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[40] Tr. 2496.

[41] Despite the lack of evidence, the prosecution asserted in closing argument that "investigators learned" Flowers "had a beef with the store." Tr. 3189.

[42] Tr. 2500.

[43] Flowers's cousin, Doyle Simpson, was a suspect in the murders. *See* Section I.C.1.

[44] Tr. 1818

[45] Tr. 2356.

[46] Tr. 2358.

[47] Tr. 2011-23.

[48] Tr. 2031.

distance away, with a single gunshot to the back of the head.[49] There were no signs of a struggle, any attempt to flee, or any effort to fight back, even after the shooting began.[50] None of the victims were bound.[51]

No proof explained how one person controlled the movements of four victims while shooting each in the head. No evidence showed how Flowers, with no criminal history, committed such a meticulous murder alone.

### C. Evidence Pointing to Other Suspects Raises Reasonable Doubt of Flowers' Guilt.

#### 1. Doyle Simpson

Doyle Simpson, Flowers's cousin, was cleared of suspicion on the day of the murders despite being a plausible suspect. Simpson owned the gun allegedly used in the murders. He conveniently reported it stolen on the day of the crime; because the gun was never found,[52] Simpson is the last known person in possession of the weapon.

Simpson's alibi was incomplete. Co-workers told investigators that Simpson was at work that day.[53] However, his job frequently required him to leave the work site,[54] providing opportunity to commit

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[49] Ex. S-39.
[50] Tr. 2011-31.
[51] Appellant's Br. at 20, *Flowers v. Mississippi*, No. 2010-DP-01348-SCT (Miss. Jul. 1, 2013).
[52] Tr. 2134-39.
[53] Tr. 2527.
[54] Tr. 2347.

the crime. Also, Simpson's sister twice saw his car, driving in opposite directions, between 9:30 a.m. and 10:00 a.m. that morning.[55] Another eyewitness noticed a car, closely matching Simpson's, in front of Tardy Furniture,[56] with a person resembling Simpson standing next to it.[57] As stated above, eyewitness Collins originally identified Simpson from the first photo spread he was shown.

### 2. Willie Hemphill

Hemphill was arrested during the investigation.[58] He had a criminal record, and was identified near Tardy Furniture the day of the crime.[59] He wore Fila brand shoes of the size and type that purportedly left the shoeprint.[60] He was held in jail eleven days. Nothing in the record indicates the reason for his release.[61]

### 3. Marcus Presley and LaSamuel Gamble

Presley and Gamble committed a string of robbery-homicides in Alabama in 1996 in a manner

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[55] Tr. 2794, 2791.
[56] Tr. 1960.
[57] Tr. 3031.
[58] *In the Dark: Discovery*, AMERICAN PUBLIC MEDIA (May 1, 2018), at 28:00-28:45, https://www.apmreports.org/story/2018/05/01/in-the-dark-s2e10 (last viewed July 16, 2018) [hereinafter *Discovery*].
[59] *Id.*
[60] *Id.*
[61] *See* Curtis Gilbert, *The Other Suspects: Who Law Enforcement Did and Didn't Investigate in the Tardy Furniture Murders*, AMERICAN PUBLIC MEDIA (June 26, 2018), https://www.apmreports.org/story/2018/06/26/other-suspects-tardy-furniture-murders (last viewed July 16, 2018).

similar to that in Winona. Presley's weapon was a .380, the same type of gun purportedly used in Winona, and he wore the same brand of shoes that allegedly left the shoeprint.[62]

## II. Racial Division Isolates Black from White Citizens on the Tardy Furniture Murders.

### A. Winona's History of Racial Conflict

Winona and its environs have a tortured history of racial conflict. Incidents of law enforcement beatings of Blacks suspected of agitating for racial justice occurred in August 1960,[63] November 1961,[64] and infamously, in June 1963, when Fannie Lou Hamer, Annelle Ponder, and other civil rights workers were arrested and beaten for sitting at the Winona bus station diner.[65] Intimidation sponsored by law enforcement continued in January 1965, when civil rights workers were threatened with eviction by

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[62] *See id.*

[63] Alan Bean, "Civil Rights tremors rumble through Montgomery County," Friends of Justice Blog, https://friendsofjustice.blog/2009/08/21/civil-rights-tremors-rumble-through-montgomery-county/ (last viewed July 18, 2018), *citing* Jackson Daily News accounts (victim refused to sit in the back of an interstate bus).

[64] Report of Tom Scarbrough, Miss. State Sovereignty Comm'n, "Winona – Montgomery County," at 4 (Feb. 23, 1962), http://www.mdah.ms.gov/arrec/digital_archives/sovcom/result.php?image=images/png/cd04/027513.png&otherstuff=2|65|0|83|1|1|1|27006 (last viewed July 18, 2018).

[65] *See Say It Plain Series*, "Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention," AMERICAN PUBLIC MEDIA, http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html, 3:05-8:11 (last viewed July 18, 2018).

the Sheriff, and endured nighttime shootings into their house[66] and stalking.[67]

In September 1966, a group of white men attacked Black children attempting to attend nearby Granada's white high school.[68] District Attorney Evans was a freshman at the school that September.[69] Another student, 15 year old Dianna Freelon-Foster, vividly recalls the attack:

> We walked out into the mob. And they beat us. And you know, just swinging the bats and whatever weapon it was they had in their hands. The one thing that I remember is them saying, constantly saying over and over again, "Nigger, go back to your school.

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[66] Incident Summary – Mississippi (January 1965), Student Nonviolent Coordinating Committee, from Lucile Montgomery Papers, 1963-1967; Freedom Summer Digital Collection at the University of Wisconsin, http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/35295.

[67] MFDP Lauderdale County--WATS (Telephone) Reports, January 1965 (Mississippi Freedom Democratic Party. Lauderdale County (Miss.) records, 1964-1966, Freedom Summer Digital Collection at the University of Wisconsin, http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/56477 (Last reviewed January 18, 2018).

[68] Letter of Bruce Hartford (1967), Civil Rights Movement Veterans Collection, Tougaloo College, at http://www.crmvet.org/docs/6700_grenada_ltr_excerpt.pdf.

[69] *In the Dark, The D.A.*, AMERICAN PUBLIC MEDIA, https://www.apmreports.org/story/2018/06/12/in-the-dark-s2e8 (last viewed July 24, 2018).

> We built a school for you. Why you coming over here with us?"[70]

Black student protests during that school year were met with armed resistance by law enforcement, including tear gas and arrests of children as young as 7 years old.[71]

The effect of Winona's continuing racial divide on elected officials is illustrated by an election commissioner who told a reporter, "You have to remember till about 1978, you couldn't get elected if you wanted to run for state representative unless you were approved by the White Citizens' Council."[72] That organization, founded in Carroll County (in the same Circuit Court District as Montgomery),[73] became defunct in the mid-1980s; but its successor, the Council of Conservative Citizens,[74] exercises

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[70] *Id.* The attackers were acquitted after 30 minutes' deliberation. Hartford, *supra.*

[71] *The D.A., supra.*

[72] Parker Yesko, "Letter from Winona: A year at the crossroads of Mississippi," AMERICAN PUBLIC MEDIA (May 1, 2018), https://www.apmreports.org/story/2018/05/01/winona-a-town-at-the-crossroads (last viewed July 18, 2018).

[73] Donna Ladd, "From Terrorists to Politicians, the Council of Concerned Citizens Has a Wide Reach," Jackson Free Press (June 22, 2015), http://www.jacksonfreepress.com/news/2015/jun/22/terrorists-politicians-council-conservative-citize/ (last viewed June 18, 2018).

[74] David Graham, "The White Supremacist Group That Inspired a Racist Manifesto," The Atlantic (June 22, 2015), https://www.theatlantic.com/politics/archive/2015/06/council-of-conservative-citizens-dylann-roof/396467/ (last viewed June 18, 2018); Southern Poverty Law Center, Council of Conservative Citizens, https://www.splcenter.org/fighting-hate/extremist-

considerable influence in the area. CCC's statement of principles includes:

> We also oppose all efforts to mix the races of mankind, to promote non-white races over the European-American people through so-called "affirmative action" and similar measures, to destroy or denigrate the European-American heritage, including the heritage of the Southern people, and to force the integration of the races.[75]

Winona's white elected officials have ties to the CCC. State Senator Lydia Chassaniol was the "surprise guest speaker" at CCC's 2009 national meeting. [76] She confirmed her CCC membership in two separate interviews.[77] CCC's publication reported

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files/group/council-conservative-citizens (last viewed June 18, 2018).

[75] Graham, *supra*.

[76] Ward Schaefer, "Minister Blasts Mississippi Senator's Connections," Jackson Free Press (July 10, 2009), http://www.jacksonfreepress.com/news/2009/jul/10/minister-blasts-mississippi-senators-connections/ (last viewed July 18, 2018).

[77] Extremist Files, Council of Conservative Citizens, Southern Poverty Law Center, https://www.splcenter.org/fighting-hate/extremist-files/group/council-conservative-citizens (last viewed July 18, 2018); Tom Mangold, "A Small Town in Mississippi," Crossing Continents, BBC Radio 4 (Nov. 26, 2009), https://www.bbc.co.uk/programmes/b00nyxvt (Flash player required) (last viewed July 18, 2018); transcript of broadcast printed by Alan Bean, "Mississippi Smoldering," Friends of Justice (Jan. 4, 2010),

that State Representative Bobby Howell frequently spoke to chapter meetings during his legislative service.[78] Karl Oliver, who replaced Howell in 2008, recently posted that the municipal officials who removed Confederate statutes in New Orleans "should be LYNCHED!"[79]

In his first election campaign, District Attorney Evans spoke at the Black Hawk Political Rally, sponsored by CCC.[80] He is known to have attended and spoken to other CCC meetings.[81]

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https://friendsofjustice.blog/2010/01/04/misaisippi-smoldering/ (last viewed July 18, 2018).

[78] Article, "Read a list of 26 U.S. elected officials whose ties with the white supremacist Council of Conservative Citizens (CCC) have been publicized in the CCC's Citizens Informer," Intelligence Report (Oct. 14, 2004), https://www.splcenter.org/fighting-hate/intelligence-report/2004/dozens-politicians-attend-council-conservative-citizens-events#16 (last viewed July 18, 2018).

[79] Arielle Dreher and Donna Ladd, "UPDATED: State Rep. Karl Oliver Calls for Lynching Over Statues, Later Apologizes," Jackson Free Press (May 21, 2017), http://www.jacksonfreepress.com/news/2017/may/21/report-mississippi-rep-karl-oliver-calls-lynching-/ (last viewed July 18, 2018).

[80] *The D.A.*, *supra*.

[81] Paul Alexander, "For Curtis Flowers, Mississippi is Still Burning," Rolling Stone (Aug. 7, 2013), https://www.rollingstone.com/politics/politics-news/for-curtis-flowers-mississippi-is-still-burning-188496/ (last viewed July 22, 2018) (CCC newsletter reports that Evans gave keynote address at 1991 annual meeting of Webster County CCC; and attended 1992 meeting at which Robert Patterson, founder of the original White Citizens Council, was the featured speaker).

### B. The District Attorney Customarily Practices Race Discrimination in Jury Selection.

Statistical evidence demonstrates that District Attorney Evans and his office exercise peremptory challenges to strike Black prospective jurors to empanel the highest-possible percentage of white jurors.[82]

American Public Media Reports has published a study of jury selection in 225 trials prosecuted by Evans or his office from 1992 to 2017.[83] These prosecutors were almost four and a half times more likely to strike a Black juror than a white juror.[84] They used over seventy percent of their peremptory strikes against Black jurors, striking fifty percent of eligible Black jurors, compared to striking eleven percent of eligible white jurors.[85]

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[82] Will Craft, "Mississippi D.A. Has Long History of Striking Many Blacks From Juries," APM Reports (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-district-attorney-striking-blacks-from-juries/ (last reviewed July 18); see also Jerry Mitchell, "Report: Mississippi DA Struck Black Jurors at 4½ Times Greater Rate," Clarion-Ledger (June 12, 2018, 11:00 AM), https://www.clarionledger.com/story/news/2018/06/12/does-da-curtis-flowers-case-seek-strike-black-potential-jurors/692156002/ (last viewed July 18, 2018); Nemeth 'In the Dark' Examines Death Row Case of Curtis Flowers (National Public Radio broadcast June 19, 2018), https://www.npr.org/2018/06/19/621269610/in-the-dark-examines-death-row-case-of-curtis-flowers (last viewed July 18, 2018).

[83] Craft, supra.

[84] *Id.*

[85] *Id.*

For eighty-nine of those 225 trials, full voir dire transcripts were available.[86] Reporters generated an odds ratio, measuring how a potential juror's race impacted his or her chance of being struck by the prosecution. For the eighty-nine trials for which juror answers on voir dire is available, the analysis revealed that a Black juror's odds of being struck were six and a half times that of a white juror who provided similar answers to voir dire questions.

In short, "race was one of the most powerful factors predicting which jurors would be struck by the prosecution."[87] Seventy-eight percent of jurors who served in these trials from 1992 until 2017 were white, and only twenty-two percent were Black in a community that is approximately forty percent Black.[88]

### C. Racial Tactics Were Used to Influence the *Flowers* Trials.

The *Flowers* prosecution further isolated the community racially.[89] Seating a diverse jury which might apply critical analysis to the evidence endangered the District Attorney's successful prosecution. Thus, consistent with his general practice, District Attorney Evans sought to maximize the number of white jurors in Flowers' trials, while his allies in the Mississippi Legislature sought

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[86] *Id.*

[87] *Id.* (offering the example that ninety-six percent of black jurors who had been accused of a crime were struck by the prosecution, compared to sixty percent of white jurors).

[88] *Id.*

[89] Tom Mangold, "A Small Town in Mississippi," *supra*; Bean, "Mississippi Smoldering," *supra*.

statutory amendments to broaden the venire to increase the proportion of white venire-members.

### 1. *Flowers I* through *Flowers V* – Racial Demographics of Jury Determines Outcome.

In *Flowers I* and *Flowers II* combined, ten peremptory challenges were exercised by Evans against Blacks. *Flowers I* was tried to an all-white jury.[90] In *Flowers II*, the trial judge granted a *Batson* objection to one of the State's peremptory challenges; that case was tried to a jury of 11 whites and one Black.[91]

The Mississippi Supreme Court condemned Evans' jury selection tactics in *Flowers III*:

> The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge . . . .
>
> ***
>
> At least 120 potential jurors indicated that they were of African–American descent, meaning that at least forty percent of the potential jury pool was African–American. This percentage closely tracks the racial demographics of Montgomery County, as defense counsel asserted that African–American citizens comprise forty-five

[90] Clerk's Papers (CP) at 1656.
[91] CP at 1662.

> percent of the county's population. **The prosecutor exercised all fifteen of his peremptory strikes on African-Americans, and the lone African-American who ultimately sat on Flowers' jury was seated after the State ran out of peremptory challenges.** Such a result cannot be considered "happenstance."[92]

The fourth trial, in November 2007, resulted in a mistrial; five Black jurors voted to acquit, seven white jurors to convict. In the fifth trial, September 2008, nine white and three Black jurors were chosen; again, the jury deadlocked on guilt/innocence. [93]

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[92] *Flowers v. State*, 947 So.2d 910, 935-36 ¶66 (Miss. 2007) (emphasis added).

[93] Emanuella Grinberg, "One crime, six trials and a 30-minute guilty verdict," CNN (June 18, 2010), http://www.cnn.com/2010/CRIME/06/18/mississippi.curtis.flowers/index.html (last viewed July 18, 2018).

The racial demography of the first five *Flowers* juries correlates with the result of their deliberations:

| Trial | White Jurors | Black Jurors | Result |
|---|---|---|---|
| I | 12 | 0 | Guilty; Death |
| II | 11 | 1 | Guilty; Death |
| III | 11 | 1 | Guilty; Death |
| IV | 7 | 5 | Mistrial |
| V | 9 | 3 | Mistrial |

### 2. Winona's Legislators Seek to Expand the Venire to Increase the Percentage of White Jurors.

This did not escape the notice of Winona's legislators. In the first legislative session after the deadlocked trials in *Flowers IV* and *Flowers V*, Rep. Howell proposed legislation to amend Mississippi's venue statute to permit the prosecution, as well as the defense, to seek a change of venue.[94] Sen. Chassaniol authored a bill to permit expansion of a criminal jury venire from the county where the crime occurred to all other counties in the district, if a prosecution resulted in a reversal after conviction, a mistrial, or an

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[94] http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0300-0399/HB0302IN.pdf.

inability to impanel an impartial jury.[95] Neither bill passed.

The percentages of white residents in the seven counties that comprise the Fifth Circuit Court District as of 2013 were as follows:[96]

| | |
|---|---|
| Webster | 78.9 |
| Choctaw | 68.0 |
| Carroll | 65.4 |
| Attala | 56.6 |
| Grenada | 56.3 |
| Montgomery | 53.4 |
| Winston | 52.1 |

Thus, had the legislation passed, the inclusion of five counties with higher percentages of white residents than Montgomery would have increased the percentage of white venire-members in Flowers' next trial. That was obviously the point.

### 3. *Flowers V*'s Black Holdout Juror Was Intimidated.

The September 2008 mistrial of *Flowers V* ended with Circuit Judge Joseph Loper[97] ordering the arrest of James Bibbs, an elderly Black man who was

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[95] http://billstatus.ls.state.ms.us/documents/2009/pdf/SB/2001-2099/SB2069PS.pdf

[96] https://www.indexmundi.com/facts/united-states/quick-facts/mississippi/white-population-percentage#map.

[97] Judge Loper was assigned to the case after the trial of *Flowers IV*.

reportedly the holdout juror. Bibbs told his fellow jurors that he was working in an alley of a lawnmower repair shop near Tardy Furniture on the day of the murders and had not seen the "manhole-to-manhole" search of downtown Winona to which law enforcement officers had testified.[98] Judge Loper accused Bibbs of perjury in *voir dire* when he did not indicate knowing about the case. However, because the "manhole-to-manhole" search was not alleged in the previous trials, Bibbs was not aware that he did, indeed, know a disputed fact in the case.[99]

Judge Loper's tirade and Bibbs's arrest were carried in the local media.[100] After the recusal of both Judge Loper and Evans, the charges against Bibbs were dismissed; but his treatment resonated throughout Montgomery County. After only one Black juror was seated in *Flowers VI*, Bibbs' lawyer noted the effect of his arrest, saying, "It was a completely bogus charge. I believe Bibbs was indicted to send a message to future jurors who vote for acquittal . . . . It's really unfortunate that there is only one African

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[98] *In The Dark: S2 E7: The Trials of Curtis Flowers, When the Jury Wasn't Nearly All White*, AMERICAN PUBLIC MEDIA, https://www.apmreports.org/story/2018/06/05/in-the-dark-s2e7 (last visited July 23, 2018).

[99] *Id.*

[100] See, e.g., Monica Land, "Mistrial in Flowers Case," Granada Star (Oct. 1, 2008), https://www.grenadastar.com/2008/10/01/mistrial-in-flowers-case/ (last viewed July 24, 2018); WAPT, "Judge Declares Another Mistrial for Flowers," http://www.msnewsnow.com/story/9109233/judge-declares-another-mistrial-for-flowers (last viewed July 24, 2018).

American on that jury in a crime where the town is so divided along racial lines."[101]

## III. The Exclusion of Black Citizens From Flowers' Juries Diminishes Confidence in the Verdicts and Raises an Unacceptable Risk That an Innocent Man Has Been Convicted of Capital Murder.

Our Constitution ensures not only the right of the criminal defendant to trial by an impartial jury, selected from a representative cross section of the community.[102] It also guarantees the right of every citizen to equal protection of the laws, thereby barring discrimination in the composition of juries on the basis of race.[103] This Court has held that "with the

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[101] Lacey McLaughlin, "Majority White Jury in Flowers Trial," Jackson Free Press (June 11, 2010), http://www.jacksonfreepress.com/news/2010/jun/11/majority-white-jury-in-flowers-trial/ (last viewed July 18, 2018).

[102] U.S. CONST. amend. VI; *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

[103] Purposeful racial discrimination in jury selection "violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). But as this Court also recognizes, "discriminatory use of peremptory challenges harms the excluded jurors and the community at large," *Powers v. Ohio*, 499 U.S. 400, 406 (1991), and criminal defendants may raise the equal protection right of a third-party juror who has been intentionally excluded from service on the basis of race. *Powers*, 499 U.S. at 415. *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994) ("We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free

exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process."[104] And "[w]hether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."[105] While these constitutional concerns center in the inherent rights of defendants and potential jurors, their promotion of diversity in jury composition may point to an equally important consideration – the performance of juries in deciding the matters that come before them.[106]

Justice Marshall once posited that diverse juries are in fact better decision makers than ones from which whole sections of the community have been stripped:

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from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.").

[104] *Powers v. Ohio*, 499 U.S. at 407.

[105] *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 330 (1970).

[106] Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 597, 599 (2006).

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[107]

Social science research on the influence of racial composition on group decision making has demonstrated such observable benefits from diversity. Not only do white and Black citizens participate in wider ranging discussions due to their different experiences and perspectives, as Justice Marshall suggested, but diversity has been shown to increase group creativity, information sharing, problem solving, flexibility, and thoughtfulness.[108]

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[107] *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

[108] Sommers at 598-99, *citing* Hoffman, L.R. & Maier, N.R.F., *Quality and acceptance of problem solutions by members of homogenous and heterogeneous groups*, 62 JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 401-407 (1961); Nemeth, C.J., *Dissent as driving cognition, attitudes, and judgements*, 13 SOCIAL COGNITION 273-291 (1995); Phillips, K.W., Mannix, E.A., Neale, M.A., & Gruenfeld, D.H., *Diverse groups and information sharing: The effects of congruent ties*, 40 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 495-510 (2004); and

For example, a 2006 study observed different decision-making processes when racially heterogeneous versus homogeneous mock juries were shown the trial of a Black defendant.[109] "Heterogeneous groups deliberated longer and considered a wider range of information than did homogenous groups."[110] In the heterogeneous juries, it was not just the Black participants who contributed to deliberation content by providing diverse points of views.[111] White participants were found to be just as responsible for the observed effects, as they "raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group."[112] The study also suggests that where white jurors expect to deliberate in a heterogeneous group, there is greater systemic processing of trial information and activation of white concern to avoid prejudice.[113]

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Triandis, H.C., Hall, E.R., & Ewen, R.B., *Member heterogeneity and dydadic creativity*, 18 HUMAN RELATIONS 33-35 (1965).

[109] Sommers at 600.

[110] *Id.* at 606.

[111] As discussed in Section I, the *Flowers* juries were presented evidence of police incompetence and misconduct, including the unattended scene, as well as the promises and threats to witnesses. Inclusion of Black citizens on the juries would have altered the assessment of this evidence, given that Blacks provide a perspective on law enforcement often not experienced by white jurors. Similarly, the difficulties of cross-racial identification by white witnesses like Collins would have been more likely noted by Black jurors.

[112] *Id.*

[113] *Id.* Even the principal negative result noted from diversity in group decision making – interpersonal conflict – "may be useful when a group's primary goal is not boosting morale but rather good and thorough decision making." *Id.* at 598.

In addition to providing better decision-making, at the heart of the fair cross-section requirement is also the recognition that "[c]ommunity participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[114] When sections of our community are intentionally excluded from jury service, public affirmation of the legitimacy of the deliberative jury process is seriously jeopardized.

## CONCLUSION

The racially discriminatory selection practice employed by District Attorney Evans violated the rights of Curtis Flowers and of the Black venire-members excluded from the jury. But the accuracy and integrity of the jury's decision-making were also casualties of Evans' discrimination. Certiorari should be granted to review these issues.

Respectfully Submitted,

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[114] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

No. 17-9572

# In The
# Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## JOINT APPENDIX
## VOLUME I


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**Petition For Certiorari Filed June 22, 2018**
**Certiorari Granted November 2, 2018**

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TABLE OF CONTENTS

Page

Relevant Docket Entries ..... 1

Defendant's Motion to Bar the Prosecution from Exercising Peremptory Strikes at All, or at Least from Exercising Them Against Non-White Venire Members, During Jury Selection or in the Alternative to Bar the Seeking or Imposition of the Death Penalty in the Event of Conviction [Vol. 13, C.P. 1651-1674][1] (Sept. 12, 2008) ..... 3

Notice of Renewal and Adoption of Motions from the Previous Five Trials [Vol. 15, C.P. 1928-1931] (Apr. 9, 2010) ..... 37

Excerpts of group *voir dire* transcript [Vol. 29, Tr. 789-790; 792-794; 861-863; Vol. 30, Tr. 905-910; 912-913; 915-916; 918; 920-935; 955; 958; 960; 964-968; 970-975; 985-991; 1002; 1027-1030; Vol. 31, Tr. 1037-1039; 1075-1076] (Jun. 7-8, 2010) .. 45

Transcript section of motion arguments during jury selection [Vol. 31, Tr. 1095-1097; 1101-1102] (Jun. 8, 2010) ..... 97

Transcript of individual *voir dire* of Carolyn Wright [Vol. 31, Tr. 1161-1165] (Jun. 8, 2010) ..... 101

---

[1] "C.P." refers to the Clerk's Papers contained within Volumes 1 through 23 of the record submitted to and considered by the Mississippi Supreme Court in connection with Flowers' appeal of his 2010 convictions and death sentence. "Tr." refers to the Trial Transcript contained within Volumes 24 through 47 of that same record.

TABLE OF CONTENTS – Continued

Page

Transcript of individual *voir dire* of Pamela Chesteen [Vol. 31, Tr. 1165-1175] (Jun. 8, 2010)..... 107

Transcript of individual *voir dire* of Harold Waller [Vol. 32, Tr. 1201-1205] (Jun. 8, 2010) ..... 120

Transcript of individual *voir dire* of Tashia Cunningham [Vol. 32, Tr. 1291-1298] (Jun. 9, 2010)..... 126

Transcript of individual *voir dire* of Edith Burnside [Vol. 32, Tr. 1298-1308] (Jun. 9, 2010) ..... 135

Transcript of testimony by Crystal Carpenter [Vol. 32, Tr. 1327-1335] (Jun. 9, 2010)..... 147

Transcript of individual *voir dire* of Bobby Lester [Vol. 32, Tr. 1335-1337; Vol. 33, 1338-1352] (Jun. 9, 2010)..... 157

Transcript of individual *voir dire* of Flancie Jones [Vol. 33, Tr. 1359-1365] (Jun. 9, 2010).... 176

Transcript of individual *voir dire* of Diane Copper [Vol. 33, Tr. 1402-1410] (Jun. 9, 2010)..... 184

Transcript section of counsel arguments during jury selection [Vol. 35, Tr. 1733-1739] (Jun. 10, 2010)..... 194

Transcript of juror tendering, peremptory strikes, and *Batson* argument [Vol. 35, Tr. 1756-1790; Vol. 36, 1791-1801] (Jun. 10, 2010)..... 202

Excerpts of Supplementation of Motion for JNOV or in the Alternative for a New Trial in Response to Order of June 30, 2010 [Vol. 22, C.P. 2953; 2964-2966; 2973] (Jul. 23, 2010)..... 242

TABLE OF CONTENTS – Continued

Page

Opinion of trial judge denying motion for JNOV [Vol. 22, C.P. 2999-3040] (Aug. 6, 2010)..... 247

*Flowers v. State of Mississippi*, 240 So.3d 1082 (Miss. 2017) (op. on remand) (Nov. 2, 2017) ..... 299

Letter from Clerk of the United States Supreme Court Granting Petition ..... 527

**RELEVANT DOCKET ENTRIES**
***State of Mississippi v. Curtis Giovanni Flowers***
**Mississippi Supreme Court Case #2010-DP-01348-SCT**
**Trial Court Case #2003-0071-CR**

| | Filed/Dated |
|---|---|
| Defendant's Motion to Bar the Prosecution from Exercising Peremptory Strikes at All, or at Least from Exercising Them Against Non-white Venire Members, During Jury Selection or in the Alternative to Bar the Seeking or Imposition of the Death Penalty in the Event of Conviction | Sept. 12, 2008 |
| Notice of Renewal and Adoption of Motions from the Previous Five Trials | Apr. 9, 2010 |
| Verdict Finding Defendant Guilty | Jun. 18, 2010 |
| Verdict Recommending Death Sentence | Jun. 19, 2010 |
| Judgement and Order Imposing Death Sentence | Jun. 19, 2010 |
| Defendant's Motion for JNOV or in the Alternative for a New Trial | Jun. 23, 2010 |
| Defendant's Supplementation of Motion for JNOV or in the Alternative for a New Trial in Response to Order of June 30, 2010 | Jul. 23, 2010 |
| Order of Trial Judge Denying Motion for JNOV | Aug. 6, 2010 |
| Notice of Appeal | Aug. 12, 2010 |

| | |
|---|---|
| ***Flowers v. State***, 158 So.3d 1009 (Miss. 2014) (affirming convictions and death sentence) | Nov. 13, 2014 |
| ***Flowers v. Mississippi***, 136 S.Ct. 2157 (2016) (order granting certiorari, vacating judgment, and remanding for further consideration) | Jun. 20, 2016 |
| Order Granting Motion for Briefing Schedule on Remand | Sept. 15, 2016 |
| ***Flowers v. State***, 240 So.3d 1082 (Miss. 2017) (affirming convictions and death sentence) | Nov. 2, 2017 |
| Order of Mississippi Supreme Court Denying Rehearing, ***Flowers v. State***, 2010-DP-01348-SCT | Feb. 22, 2018 |

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, MISSISSIPPI

| | |
|---|---|
| STATE OF MISSISSIPPI | PLAINTIFF |
| v. | CAUSE NO. 2003-0071-CR |
| CURTIS GIOVANNI FLOWERS | DEFENDANT |

**MOTION TO BAR THE PROSECUTION FROM EXERCISING PEREMPTORY STRIKES AT ALL, OR AT LEAST FROM EXERCISING THEM AGAINST NON-WHITE VENIRE MEMBERS, DURING JURY SELECTION OR IN THE ALTERNATIVE TO BAR THE SEEKING OR IMPOSITION OF THE DEATH PENALTY IN THE EVENT OF CONVICTION**

(Filed Sep. 12, 2008)

COMES NOW Curtis Flowers, by and through the undersigned counsel, and moves this Court, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 3 §§ 14, 26, 28 and 31 of the Mississippi Constitution of 1890, to bar the prosecution from using peremptory strikes at all, or at least from using them against non-white venire members during jury selection, or in the alternative to bar the seeking or imposition of the death penalty in the event of conviction, and in support of this motion, Defendant would show the following:

1. Curtis Flowers is African-American. He is currently facing retrial on four counts of capital murder

in Montgomery County, Mississippi. This is the fifth attempt by the State to obtain a valid conviction of Mr. Flowers on any of these charges. The first two trials involved a single count and the last two trials involved all four counts. The first three attempts to convict Mr. Flowers resulted in convictions and death sentences that were reversed on direct appeal. The fourth attempt, in which the death penalty was not sought, resulted in a mistrial when the jury was unable to agree on a verdict.

2. The first two verdicts were reversed because the Supreme Court of Mississippi found that the verdicts had been obtained through prosecutorial misconduct not relating to jury selection. *See State v. Flowers*, 773 So. 2d 309, 317 (Miss. 2000) ("*Flowers I*"); *State v. Flowers*, 842 So. 2d 531, 538 (Miss. 2003) ("*Flowers II*") (both reversing for prosecution misconduct involving, *inter alia*, questioning witnesses about non-existent and/or inadmissible facts and arguing matters not in evidence to the jury).

3. The third verdict was reversed specifically because of the prosecutor's racially discriminatory use of his peremptory strikes to eliminate qualified African-American venire members from the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *State v. Flowers*, 947 So. 2d 910, 916, 923-31 (Miss. 2007) ("*Flowers III*").

4. The State has announced that it will, despite foregoing the opportunity to do so in the fourth trial, seek the death penalty against Mr. Flowers in the event he is convicted, thus bringing into play the

court's obligation to accord "heightened scrutiny" to any legal or factual claims made by the defendant. *State v. Flowers*, 947 So. 2d 910, 916, 923-31 (Miss. 2007) ("*Flowers III*").

## I. MOTION TO BAR THE PROSECUTION FROM EXERCISING PEREMPTORY STRIKES AT ALL, OR AT LEAST FROM EXERCISING THEM AGAINST AFRICAN-AMERICAN VENIRE MEMBERS, DURING JURY SELECTION

5. The Supreme Court of the United States and the Mississippi Supreme Court have both unequivocally declared that racial discrimination in jury selection may not be tolerated, and any verdict entered by a jury tainted with this discrimination cannot stand. *Batson v. Kentucky*, 476 U.S. 79 (1986), *Lockett v. State*, 517 So.2d 1346, 1349 (Miss. 1987) (implementing *Batson*).

6. Over the years since *Batson* was decided both the state and federal high courts have adopted standards for determining how this often subtly manifested evil is to be ferreted out and remedied. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2005) (reiterating that the totality of the circumstances analysis of whether racial discrimination occurred requires looking at the cumulative effect of all the circumstances, not relying on any one justification offered in isolation and reversing, for the second time, the Fifth Circuit's failure to remedy such invidious discrimination by a Texas district attorney and without the usual remand for the Fifth Circuit to act, entering the order setting aside the conviction

itself); *Snyder v. Louisiana*, ___ U.S. ___. 128 S. Ct. 1203, 1212 (2008) (recognizing that, in the absence of contemporaneous specific findings by the trial court concerning the alternative reasons relied on, retrospective validation of peremptory strikes is impossible and held that "for present purposes, it is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained on the basis of any lesser showing by the prosecution.") *Flowers III*, 947 So. 2d at 923-31 and 940 (discussing *Batson* specifically in reference to the prosecution of Mr. Flowers).

7. From the institution of this case in 1997 through the present, the lead prosecutor in this matter has been Fifth Circuit Court District Attorney Doug Evans, who is also going to be the lead prosecutor in this one. In both the second and third trials Mr. Evans was judicially determined to have racially discriminated in his use of peremptory challenges during jury selection. See rulings of Judge C.E. Morgan, III at Fl. II Tr. 1349; 1363 (second trial) and findings of the Mississippi Supreme Court in *State v. Flowers*, 947 So. 2d 910, 923-31 (Miss. 2007) ("*Flowers III*") (third trial). In the first and fourth trials, there was no judicial disposition of the *Batson* issues, in the first trial because the appellate court declined to decide the issue raised after reversing on other grounds, in the fourth because the State's methods failed to prevent a fairly constituted jury from being seated, and there was, in any event, was [sic] no verdict to be reviewed by way of motion for mew [sic] Trial or appeal.

8. However, the records of both make it clear that they, too, were pervaded with similar racially discriminatory jury selection methods prohibited by *Batson* and its progeny. A tabular representation of the State's persistent, pernicious and invidious use of its peremptory challenges over the 10 years it has been attempting to convict Mr. Flowers is attached hereto as Exhibit A.

9. In light of the continuing use by the prosecutor of condemned practices in peremptory strikes even after judicial condemnation of his methods, restricting his use of those strikes in the upcoming trial is the only way to prevent his continued willful violation of the Fourteenth Amendment rights not only of this defendant, but of the community as a whole, and the consequent undermining of the justice system that inevitably occurs when such invidious discrimination occurs. *Miller-El v. Dretke*, 545 U.S. at 238.[1]

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[1] The Court in *Miller-El v. Dretke* implies the need for diligent and creative judicial efforts if this thorny but significant problem is to be remedied:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880); *see also Batson v. Kentucky*, *supra*, at 86. Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia*, *supra*, at 308, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored

10. Although the right to peremptory strikes in a capital case is given to the State by Miss. Code Ann. § 99-17-3, that right must give way to the Equal Protection Clause of the United States Constitution and it is in the inherent power of a court enforcing the Equal Protection Clause to exercise such remedies to prevent its violation as are effective in doing so. *Batson*

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group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994).

Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. . . ." *Powers v. Ohio*, 499 U.S. 400, 412, (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *ibid.*, and undermines public confidence in adjudication, *Georgia v. McCollum*, 505 U.S. 42, 49, (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, (1991); *Batson v. Kentucky*, *supra*, at 87. So, "[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause." *Georgia v. McCollum*, supra, at 44, 112 S.Ct. 2348; see *Strauder v. West Virginia*, *supra*, at 308, 310; *Norris v. Alabama*, 294 U.S. 587, 596, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Swain v. Alabama*, *supra*, at 223-224, 85 S.Ct. 824; *Batson v. Kentucky*, *supra*, at 84, 106 S.Ct. 1712; *Powers v. Ohio*, *supra*, at 404, 111 S.Ct. 1364.

*The rub has been the practical difficulty of ferreting out discrimination in [discretionary] selections . . .*

545 U.S. at 237-38 (string citations omitted) (*emphasis added*)

*v. Kentucky*, 476 U.S. 79 (1986), *Swain v. Alabama*, 380 U.S. 202, 224 (1965).[2]

11. The Mississippi Supreme Court has recognized the existence of, and invoked, the inherent judicial power to take such actions even when not expressly authorized by statute or rule:

> It is important to note that this power, at least in its summary aspect, is grounded not in the Court's punitive jurisdiction but rather in its necessary and inherent power to regulate its proceedings. . . . [F]undamental to the establishment of the superior governmental entities by the Constitution is the vesting of those powers necessary to insure the ability of those entities to exercise essential measures of preservation and protection to secure their existence and the beneficial execution of the high governmental duties imposed upon them.

*In re Lewis*, 654 So.2d 1379, 1383 (Miss. 1995) (finding it within Court's inherent powers to suspend a malfeasant attorney from practice before the courts of the state even prior to completion of the statutory and rule

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[2] Miss. Code Ann. § 99-17-3 provides only for the number of peremptory strikes (12, plus one for each alternate to be selected) each side in a capital case may have, and that the State must at all times tender a full panel before the defendant exercises any peremptories. Though the Supremacy Clause would, of course, permit complete abrogation of the statute if necessary to remedy racial discrimination, that would not be necessary if the court elected to grant one of the defendant's requested alternate reliefs and permit the State to use up to the full number of peremptories, but simply to restrict their use against non-white venire members, or preclude it from seeking the death penalty.

based disciplinary/suspension/disbarment process if necessary to prevent the attorney from doing continuing harm during the pendency of the proceedings).

12. Given the recognized difficulty attending ferreting out and remedying abuse of the discretion that is the hallmark of peremptory strikes, this prosecutor's repeated abuse of his discretionary right to employ peremptory strikes in the past in this case must be prevented from happening again. *Miller-El v. Dretke*, 545 U.S. at 238, *Snyder*, 128 S. Ct. at 1212 (referring to "this subtle question of causation").

13. Since judicial rebukes for past abuse of this right were demonstrably of no avail in preventing its reoccurrence, the only way to do this effectively in the upcoming trial will be by precluding the State from employing any peremptory challenges at all, or at least precluding it from employing such challenges to exclude African-American venire members who have not been otherwise disqualified for cause from serving on the trial jury.

**First Trial – October 1997 – Lee County – Record Establishes Racial Discrimination: 100% Of Minority Jurors Tendered Challenged By State All-White Jury Hears Case**

14. The first trial of this matter, on the indictment for capital murder of Bertha Tardy, occurred in October, 1997 in Lee County, Mississippi, but as a Montgomery County Circuit Court matter, presided over by Hon. C.E. Morgan, III, Circuit Judge of the 5th

Judicial District of Mississippi, in which Montgomery County is located. At that trial, after voir dire and excusals for hardship and for case related cause (including *Witherspoon* removals), there were 97 persons on the panel upon which the State exercised its peremptory challenges. Of those venire members 22 were African-American (23%) and 75 (77%) were White [Fl. I Tr. 234].

15. During the course of jury selection, 36 venire members – five of the 22 African-American and 31 of the 75 White venire members were tendered to District Attorney Evans for acceptance. Mr. Evans struck all five African American jurors presented to him [Fl. I Tr. 235]. This resulted in an all white jury being seated to try the first trial. [Fl. I Tr. 235; R. 378. (Defendant's Motion for JNOV or New Trial ¶ 5)]. *See also*, Exhibit A (with further comparative tabulations)

16. The Defendant interposed a *Batson* objection, noting these facts and that there had been nothing in voir dire of the jurors struck to suggest any basis other than race for the strike. [Fl. I Tr. 235]. The trial court denied the Defendant's objection and permitted the all [sic] jury, selected by the State striking every African-American juror presented to it, to stand, [Fl. I Tr. 239; R. 378].

17. The *Batson* error was identified by the attorneys handling the direct appeal of the conviction and sentence that this jury entered to be of sufficient merit to be raised as Issue I in the direct appeal of this conviction. *Flowers I*, 773 So. 2d at 315. However, when the

case was reversed as a result of the prosecutorial misconduct regarding use of facts not in evidence and other crimes evidence, and the accumulation of other errors, the Court expressly stated that it would not and did not discuss or decide the *Batson* question. *Id.* at 317. Nonetheless, the facts in the record suggest that intentional racial discrimination [sic] the part of the prosecution infected jury selection in the first trial.[3]

18. Many of the reasons articulated by the State to justify its peremptory strikes of all five African-American venire members in this first trial were similar to those that Mississippi Supreme Court found to be pretextual in *Flowers III* under the "five indicia of pretext that are relevant when analyzing the

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[3] The trial court did not find that a prima facie *Batson* claim had been made out, at least in part because the state had exercised some of its peremptory strikes against white jurors as well. Under present case law, this was clearly error. The U.S. Supreme Court has made it clear that neither a prima facie case, nor a showing of pretext can be defeated because the prosecutor did not utilize all his strikes against minority jurors, or even if he elected not to strike some minority jurors,. *Miller-El v. Cockrell*, 537 U.S. 322, 332 (2003) (finding that arguable case of *Batson* sufficient to warrant federal habeas review appeared from the record and remanding to Fifth Circuit with instruction to address merits of claim, despite the fact that prosecutor permitted a minority juror to serve and peremptorily struck four non-minority prospective jurors); *Miller-El v. Dretke*, 545 U.S. at 240-41 (reviewing failure of lower court on previous remand to find substantive *Batson* violation in same case, finding such violation and reversing conviction without further remand). This error, had it been reached, could have required remand to correct that problem, if not to reperform the entire *Batson* process. *See e.g. Puckett v. State*, 737 So.2d 322, 334 (Miss. 1999).

race-neutral reasons offered by the proponent of a peremptory strike."

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the characteristic cited; . . . (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits. *Manning v. State*, 765 So.2d 516, 519 (Miss.2000).

*Flowers III*, 947 So. 2d at 917, 919.[4]

19. The transcript of voir dire in this trial [Fl. I Tr. 122-219] shows that none of the African-American jurors peremptorily struck was questioned in voir dire by the State concerning the matter for which Mr. Evans stated that he or she was struck. State peremptory strikes S-2 and S-5 of African American venire members Ms. Locus (juror number not in the record) and Mr. Jimmy Wayne Cummings (juror number 19) were expressly founded in whole or in part on "group based traits" despite the lack of voir dire on the subject

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[4] *Flowers III* was, obviously, decided well after the trial court and the Mississippi Supreme Court were presented with the *Batson* claim in Mr. Flowers' first trial. However, these standards for proving pretext had been implemented in Mississippi long before then. *See e.g. Lockett v. State*, 517 So.2d 1346, 1349 (Miss. 1987); *Bush v. State*, 585 So.2d 1262, 1268 (Miss.1991); *Perry v. State*, 637 So.2d 871, 874 (Miss. 1994) (cited by the Court in *Flowers III*); *Stewart v. State*, 662 So.2d 552, 557 (Miss.1995).

and with little or no record support for the purported factual information.[5]

20. State peremptory strike S-10, against African American venire member Shelia Smith (juror number 46) is without record support, other than that she was employed as a federal corrections officer at a halfway house. It seems inherently implausible for a prosecutor to strike a law enforcement official from a

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[5] Peremptory S-2 was articulated to be due to Ms. Locus status as a single mother with three children and "no husband to help take care of them," and her religion. There was no State voir dire of Ms. Locus regarding either of these statuses so the assumptions made were clearly "group based" and not particular to her individual circumstances with respect to either status. Indeed, had her childcare needs interfered with her "ability to sit and be fair and impartial and not try to rush through this trial" as articulated by Mr. Evans [Flowers I Tr. 236], she like at least one other juror, a Ms. Smallwood, would have been able to share that information in voir dire and been excused for cause [Flowers I Tr. 222]. It does not appear that any other venire members not excused for cause because of having small children and spouses unavailable to care for them were either questioned about that or peremptorily struck for that reason, either As to the second justification, shortly after this trial, the Mississippi Supreme Court held that as a matter of Mississippi constitutional and statute law that "while we will permit a party to strike a potential juror for her actual beliefs, even if that belief springs from her religion, we will not allow challenges based solely on a potential jurors' religious affiliation [or lack thereof]." *Thorson v. State*, 721 So.2d 590, 594-95, (Miss.1998). S-5 was exercised against Mr. Cummings, at least in part because of the neighborhood he resided in, though again with no voir dire by the State of him or anyone else on the panel on the subject matter of neighborhood of residence, and only on the basis of vague information provided by unnamed Sheriffs or Police departments not otherwise substantiated in the record.

jury if he or she survives cause excusal by the Court or peremptory challenge by the defense as Ms. Smith did here. *See Miller-El v. Dretke* 545 U.S. at 246; *Snyder*, 128 S. Ct. at 1211.[6]

21. Even where the African-American venire members were struck for reasons like those applied to white venire members as well – for arrests, or for having family members with criminal involvement (S-4 of Bobby Williams, juror 15; S-7, of Mamie Cayson, juror 28; and as a second reason cited for S-5 against Mr. Cummings, juror 19) [Fl. I Tr. 237-38] there was apparently no voir dire by the DA on this subject, or any effort to discover similarly situated Whites who did not self disclose on their juror questionnaires, whereas it appears from the record that some of the information about African-American prospective jurors came from independent investigation.

22. Hence, the record is clear that racial discrimination was practiced by the State in using its peremptory challenges of at least two Blacks, and possibly in

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[6] During court voir dire concerning people with law enforcement ties, and Ms. Smith assured the court that this would not impair her ability to be fair and impartial. [Fl. I Tr. 141]. The State cites an alleged discussion with an unspecified "sheriff's department" not otherwise substantiated in the record, about Ms. Smith's purported liberal political views (a group-based trait, actually) and the unnamed department's speculations regarding her possible sympathy for criminals as the basis for the strike. [Fl. I. Tr. It did not, however, voir dire Ms. Smith, or anyone else who had law enforcement ties but assured the court they could still be fair and impartial, concerning their political views and/or their sympathies for criminals they may have worked with.

more, at the first trial in this matter. This supports depriving the State of the opportunity to do this again.

**Second Trial – March 1999 – Harrison County – Trial Judge Finds Racial Discrimination 100% Of Minority Jurors Tendered Challenged By State Single Black Juror On Jury But Only Trial Court Finds Batson Violation In Attempt To Strike Him**

23. In [sic] the second trial of Mr. Flowers was on the indictment for the capital murder of Derrick Stewart. This trial took place in March, 1999 in Harrison County, Mississippi, again as a Montgomery County matter presided over by Judge Morgan. At this second trial, the trial court specifically found that District Attorney Evans had racially discriminated in his use of peremptory challenges by citing pretextual reasons not applied to comparable Whites and/or not supported by the record or the judge's personal observations in attempting [sic] justify two of his peremptory strikes of African-American venire members. [Fl. II Tr. 1347-49; 1355-63].

24. Seventy-five venire members were in the panel that survived initial qualification, and on which both cause and peremptory strikes were made. Of those 75, 15 were African-American (20%) and 60 (80%) were White, [Fl. II Tr. 969; R. 1220-21]. After removals from the venire for case related cause (including *Witherspoon* removals) a total of 49 venire members, 11 African-American (22%) and 38 White (78%), remained on the panel on which the State exercised peremptory strikes. Of these 49, a total of 30 – five African-American, 25

White – were tendered to the state for consideration. Once again, as he had in the first trial, Mr. Evans directed a peremptory challenge to each and every one of the African-American venire members tendered to him for acceptance on the final jury panel. [Fl. II Tr. 1166-76; 1313; 1320; 1327-29; R. 1218-23]. *See also* Exhibit A.

25. The five jurors struck by the prosecutor in this trial were Linda Yarbrough (venire member 5, S-1, African-American female); Sherry Lott (venire member 12, S-3, African-American female); Gania K. Gray (venire member 19, S-4, African-American female); Tyron D. Cole (venire member 27, attempted S-5, African-American male); and Eugene Crockett, Jr. (venire member 28, S5, African-American male). Only one peremptory was directed at a white venire member during selection of the regular jury, Karen Cook (venire member 10, S-4, white female). [Fl. II Tr. 1342-52; 1355-63; R. 1220, 1222]. A second white person was struck by the prosecution during alternate selection, but no African-Americans were tendered to it for acceptance or strike during that process. [Fl. II Tr. 1368-69; R. 1220,1222]. *See also* Exhibit A.

26. The defense interposed *Batson* objections to the peremptory strikes exercised against all five of the African-American venire members. [Fl. II Tr. 1343-44 (Yarbrough, Lott and Gray); 1355 (Cole); 1363-64 (Crockett)]. The court found that the State's seeking to peremptorily strike all African-American prospective jurors tendered to it made out a prima facie case of racial discrimination and required the State to articulate

reasons for these strikes, and for the strike of Ms. Cook, the one white venire member struck by the State, as well. [Fl. II Tr. 1343-44]

27. The defense offered rebuttal to all of the proffered reasons. [Fl. II Tr. 1344-45 (Ms. Yarbrough); 1246-51 (Ms. Lott); 1351-52 (Ms. Gray); 1356-62 (Mr. Cole); 1364 (Mr. Crockett)]. The trial court rejected some of this rebuttal, but accepted it with respect to two of the attempted strikes, finding that that [sic] one of the two reasons offered for the strike of Ms. Lott (no. 12, S-3)[7] and all three of the reasons articulated for the strike of Mr. Cole (no. 27, first, failed, use of S-5) were pretexts for racial discrimination. [Fl. II Tr. 1347-48; 1363-64].[8]

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[7] In Ms. Lott's case the State articulated two reasons for peremptorily striking her. The first one addressed by the court was the State's contention that it struck Ms. Loft because she had stated in her questionnaire that she thought he [sic] death penalty was only appropriate when there were children involved [Fl. II Tr. 1344]. The defense rebutted this by establishing that Ms. Lott had not in fact so limited her view of the death penalty in her questionnaire, and pointing out that the State had accepted white jurors who had expressed even stronger reservations about the death penalty than Ms. Lott and the Court found that explanation pretextual because it had not been applied to comparable Whites. [Fl. II Tr. 1346-47].

[8] In Mr. Cole's case, the State offered three reasons for its strike: 1) that he was not an eligible juror because his summons was for a general venire assigned to another courtroom, not the special venire in this case; 2) that "according to members of the District Attorney's Office here [Harrison County] he is a gang member . . . of the BGD gang;" and 3) that he "acted like he was sleeping during part o the voir dire." a [sic] [Fl. II Tr. 1355-56]. The trial court rejected the first reason as pretextual on factual grounds since the case was not being tried to a special venire, but rather to a general venire, and that the custom in Harrison county

28. In the case of Ms. Lott, the trial court nonetheless upheld the strike, finding that a second reason proffered was not pretextual [Fl. II Tr. 1351], a ruling that is questionable in light of the Supreme Court's intervening elaboration on examining pretext where multiple reasons are given. *See, e.g. Miller-El v. Dretke*, 545 U.S. at 246 (suggesting that cursory acceptance of backup reasons proffered by a prosecutor after an initial one is challenged is suggestive of pretext in and of itself).

29. However, since all three reasons proffered for the strike of Mr. Cole were demonstrated to be factually untrue, Mr. Cole was seated on the jury. But for that judicial intervention the State's tactic of striking every African-American tendered to it would again have resulted, as it had in the first trial, in the seating of a lily-white jury in the second trial, as well.[9]

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was to commingle all jurors summonsed to all courtrooms on any given day if one courtroom did not have sufficient jurors to try a case. [Fl. II Tr. 1355, 1360-63]. The second reason was abandoned after a Harrison County DA Office investigator disclosed to Mr. Evans that Mr. Cole was "not a BGD member or is not the one he though at least" [Fl. II Tr. 1361]. The third reason – that Mr. Cole had been sleeping or otherwise inattentive during voir dire – was rejected as a complete fabrication. Judge Morgan, stated that "I watched him and he answered questions during voir dire and did not notice that he did that, and I am ruling that you cannot strike him." [Fl. II Tr. 1363]

[9] As there were only 11 African-American venire members in the entire available panel, Mr. Evans could have excluded the white prospective juror he did and still had enough peremptories remaining to attempt to challenge every African-American venire person remaining, even without accounting for the two additional

30. The trial court's findings of pretext are further supported by record evidence that three of the other "indicia of pretext" recognized by the Mississippi Supreme Court in *Flowers III* were also in play in this trial: disparate treatment of comparable minority and non-minority venire members with respect to death penalty views,[10] failure to voir dire in the area cited, and lack of relationship between the reason cited and the case.[11] *Flowers III*, 947 So. 2d at 921-30. Indeed, the

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peremptory challenges given to each side to strike for the alternates.

[10] The State cited alleged negative views on the death penalty not only with respect to Ms. Lott (no. 12, S-3), as to whom they were expressly found to be pretextual because of disparate treatment of a particular white venire member (Ms. Carol Young, no. 13, and the fourth juror seated) with similar views, [Fl. II Tr. 1347-49], but also as the sole reason for its strike of Linda Yarbrough (no. 5, S-1) [Fl. II Tr. 1344] and a contributing reason for striking Gania K. Gray (no. 19, S-4) [Fl. II Tr. 1351] and Eugene Crockett, Jr. (no. 28, S-5) [Fl. II Tr. 1363], as well. The defense also identified several other potentially comparable Whites accepted by the State in its rebuttal. [Fl. II Tr. 1363]. The trial court made no findings about the disparate treatment identified as to the other White or African-American venire persons, thus leaving open the possibility that the same discriminatory pretext that infected one of the reasons for striking Lott also infected the strikes of others. See *Snyder v. Louisiana*, 128 S. Ct. at 1212. Though the *Batson* objection to this disparate treatment was not addressed in the appeal in *Flowers II*, in *Flowers III* the Mississippi Supreme Court was particularly troubled about the possibility that citing death penalty views of African-American jurors as a "non-racial reason" for striking them when similarly situated white jurors went unchallenged was very suggestive of pretext. 947 So. 2d at 921, 927, 939-40.

[11] For example, the reason credited by the trial court for the state strike of African-American venire member Gania Gray was that she suffered from and took medicine for panic attack disorder.

fact that the trial court failed to address most of these indicia at all would, if they were raised on appeal today, not even be available as rationales for the strike because of that failure to address. *Snyder v. Louisiana*, 128 S. Ct. at 1212.

31. Given the record, and, most importantly, the explicit findings of racial discrimination made by the trial court in this trial, it is beyond cavil that Mr. Evans abused the discretion accorded him by allowing him peremptory strikes in the second trial, and fully justifies an order depriving him of the opportunity to do so again.

Third Trial – February 2004 – Montgomery County – Supreme Court Finds Racial Discrimination 100% Of Minority Jurors Tendered Challenged By State, 100% Of Challenges Employed By State Used Against Minority Jurors Single Black Juror On Jury But Only Because State Exhausts Challenges Before She Is Tendered

32. Mr. Flowers' third trial, on four counts of capital murder, one for each of the four people found dead

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[Fl. II Tr. 1351]. On the court's voir dire she said nothing about the condition affecting her ability to serve, only requested reassurance that she would be able to get her medicine if she were selected. [Fl. II Tr. 936]. The State did not voir dire her further on this particular medical condition, much as it never questioned venire member Cole regarding his alleged sleepiness or inattention. Similarly, African-American prospective juror Crockett was never voir dired by the state on his need to care for his dog, which the State cited as a reason it was striking him. [Fl. II Tr. 1353]. None of these alleged justifications had anything at all to do with the case, either.

at Tardy Furniture in 1996, was held in Montgomery County in February 2004. The State obtained convictions and death sentences on all four counts, but those convictions and sentences were reversed on appeal by the Mississippi Supreme Court, again for prosecutorial misconduct committed by District Attorney Evans.

33. Despite having been judicially rebuked for racial discrimination regarding reasons offered for peremptory challenges directed at two African-American venire members in the second trial, and having actually been judicially prevented from exercising one of them due to that racial discrimination, [Fl. II Tr. 1347-48; 1363-64], District Attorney Evans nonetheless persisted in his racially invidious conduct during jury selection in the third trial, conduct which was at the core of the reversal handed down by the Supreme Court. *State v. Flowers*, 947 So. 2d 910, 923-31 and 939-40 (Miss. 2007) (*"Flowers III"*) (finding that the prosecutor's racial discrimination in use of peremptory challenges warranted reversal either on basis of *Batson* alone or on *Batson* together with a panoply of other errors including recurrent prosecutorial misconduct of the same nature as had been previously condemned by the Court in *Flowers I* and *II*).

34. The District Attorney's demonstrated inability to obey the strictures against race discrimination in jury selection when they are pointed out to him after the fact necessitates this honorable court taking preemptive action to ensure that they cannot happen again. *In re Lewis*, 654 So.2d 1379, 1383 (Miss. 1995).

*See also Miller-El v. Dretke*, 545 U.S. 231 (2005), *Snyder v. Louisiana*, ___ U.S. ___. 128 S. Ct. 1203, 1212 (2008).

35. On its third attempt to convict Curtis Flowers, the State's Batson-violating "racial profiling," *Flowers III*, 947 So. 2d at 939, of the jury venire reached a new level. As in the first two trials, the prosecution exercised peremptory strikes against every single African-American prospective juror tendered to it to serve as either a regular or alternate juror exhausting all 15 of its strikes in doing so. *Flowers III*, 947 So. 2d at 918. The Court characterized the prima facie case created by this disproportion and the fact that all the strikes exercised by the state were against African-Americans "as strong a prima fiche [sic] case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So. 2d at 935.[12]

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[12] Despite the prosecution's relentless efforts, a single African-American made it onto the jury panel at the end of this process, but only because the State had exhausted all its peremptory strikes at the point her name, and that of another African-American prospective juror who was belatedly disqualified for cause, came up in the jury pool. *Id.* at 918. *See also* Exhibit A. Hence, the pool of jurors that convicted Mr. Flowers in the third trial was, as the one in the second trial, less than 1% African-American. Even without comparing it to the pool of citizens from which it was drawn, this is a breathtaking anomaly in an era where the pool of major party candidates for the office of President of the United States is 50% African-American. More pertinently to the statistical improbabilities attending in the third failed conviction of Curtis Flowers, Montgomery County, where this jury was drawn from is 45% African-American. More pertinent still, of the 300 prospective jurors who responded to their jury summons and submitted questionnaires, 126 or 42% identified themselves as Black, 161 or 54% identified themselves as White, 3 or 1%

36. Because it exhausted all 15 of its strikes purging the jury of Blacks, it perforce accepted every white venire person tendered to it, including numerous white jurors whose views on the death penalty, and/or having family members who were prosecuted or convicted of crime (another favorite reason cited by the prosecution for striking black venire members in this and Mr. Flowers' other trials) were effectively indistinguishable from those of the continuous parade of African-American venire members being peremptorily stricken. *Id.* at 921, 929-3, 934. *See* Exhibit A.

37. In the end, the Court reversed because it found that the record established without a doubt that at least two of the African-American jurors struck had been struck racially discriminatorily, and that the reasons advanced by the State for doing so were unfounded by the record, or so clearly ignored in similarly situated white jurors, that the verdict the jury so constituted had reached was so tainted that it could not be allowed to stand. *Id.* at 936.

38. Though the Court did not find that all of the disparate treatment it observed was, standing alone, reversible error under *Batson*, it repeatedly noted that even those strikes it did not find to be reversible error were "problematic," *Flowers III*, 947 So. 2d at 929 or "suspect, as an undertone of disparate treatment exists in the State's voir dire of these individuals" *Id.* at 936,

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identified themselves as belonging to another race, and 10 or 3% provided no information regarding their race. [Fl. III Record, Juror Questionnaires]

or, at the very least recognized as errors which, "viewed in the aggregate with others . . . result in cumulative error sufficient to warrant a new trial." *Id.* at 940 (Cobb, Presiding J., concurring in result only).

39. The stinging rebuke issued by the Court in *Flowers III* for a pattern of racially discriminatory prosecutorial behavior, even standing alone, fully warrants preventive action by this court to stop it from ever happening again. Moreover the methods by which that racial discrimination found in *Flowers III* was executed have continued even after the Court's admonishments that they must cease.

**Fourth Trial – November 2007 – Montgomery County – Discriminatory Methods Persist 100% Of Challenges Employed By State Used Against Minority Jurors Racially Proportionate Jury Seated Despite State's Best Efforts To Prevent It**

40. At the fourth trial of Mr. Flowers, also on all four counts of capital murder, the State announced prior to the beginning of jury selection that it would not be seeking to have the jury impose the death penalty in the event of a conviction. This was an entirely reasonable decision, given the fact that the verdicts in the first three trials were reversed under the heightened scrutiny standards of review applicable when a sentence of death is imposed, members of most of the victim families have publically [sic] stated that they do not insist on seeking the death penalty, and because of

the almost entirely circumstantial nature of the evidence implicating Mr. Flowers in this matter.[13]

41. In this trial, the jury and alternates selected were composed of five African-Americans (all on the regular jury) and nine Whites (two of them alternates. For the first time in the 10 years during which this case was tried and retried, this jury represented less than a 10% statistical variation from the racial composition of the pool of qualified jurors tendered to the parties for peremptory challenges. See juror questionnaires and juror strike lists on file in the Office of the Circuit Clerk of Montgomery County, Mississippi, incorporated herein by reference. *See also* Exhibit A (summarizing the information contained in those records.) This result, however, occurred despite the fact that the State persisted in its old patterns, not because it abandoned them.[14]

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[13] The only evidence that has ever been offered against Mr. Flowers that qualifies as "direct" evidence of guilt is the testimony of a jailhouse snitch concerning a somewhat incriminatory statement Mr. Flowers allegedly made to the snitch. Over the course of the previous three trials the snitch gave so many inconsistent versions of what the conversation contained that the State would have had good reason to be concerned that it might not be credited as proof beyond a reasonable doubt by all jurors.

[14] Exhibit A shows that there were a total of 45 qualified venire members remaining on the panel after excusals and disqualifications for cause, 19 Black and 26 White. Of these 45, the State was called upon to review a total of 36,16 [sic] (or 44%) Black and 20 (56%) White. The strike sheets on file establish that the prosecutor exercised a total of 11 strikes, 10 during regular jury selection and one additional strike during alternate selection and that 100% of those strikes were made against African-American venire

42. As in *Flowers III*, in the fourth trial every strike that the State exercised was exercised against African-American prospective jurors and, conversely, the State approved every white venire presented to it for service on the jury – including two with their own or family members' criminal convictions and one who expressed scruples against the death penalty and revealed "liberal" associations in the juror questionnaire.[15]

43. Why, then, did the jury that resulted, not reflect the huge racial disproportion to the pool from which it was selected as the juries in the first three trials? First, and probably the most important, was the decision not to seek the death penalty. This deprived the State one of the two most prevalent reasons (the other being the juror's own or his family members' prior criminal involvement) it had cited in previous trials to justify its persistent attempts to strike every lack [sic] venire person it possibly could strike. It also consigned death penalty views to factors unrelated to

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members. However, because there were more black qualified jurors on the panel than the State had strikes this did not result, as it had in the third trial, in a disproportionately white final jury.

[15] Juror questionnaires on file for white venire members Carol Ann Griffin, Charles Thomas Jones, and Malinda Tidwell show that Ms. Griffin had scruples against the death penalty as well as an association with at least one liberal – some would call it radical – group, PETA; that Mr. Jones had criminal involvement of both himself and a close friend; and that Ms. Tidwell had a family member who had been convicted of a crime.

the case, and thus potential "indicia of pretext" for that reason alone.[16]

44. Second, the "luck of the draw" put a disproportionate number of the African-Americans – 16 of the 19 on the qualified panel – in the first 36 jurors, and 12 of the 16 in the first 24 presented to the State for approval. This resulted in a panel that would have inevitably had at least four African-American jurors on it even if the state had elected to employ its remaining three strikes against African American prospective jurors (two unexercised during selection of the regular jury, one unexercised during selection of alternates), as it had the first 11. As it turned out, because the jury would in any event be relatively diverse and not grossly disproportionate to the racial makeup of the venire and the county from which it was summoned no matter how diligent any efforts by the state to racially

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[16] As a consequence of this decision no voir dire was conducted about death penalty attitudes, nor were any venire members excluded for cause related to those attitudes prior to arriving at the panel of qualified jurors on which peremptories were exercised. Moreover, the Supreme Court had already cautioned in *Flowers III* that it found this a "troublesome" reason even when the death penalty was being sought, and only declined to find *Batson* error for those strikes in *Flowers III* because it elected to defer to the trial court's opportunity to observe intangible things such as physical mannerisms, vocal inflection or demeanor during voir dire on the subject that could have demonstrated that whites and Blacks with identical "on-paper" death penalty attitudes were in fact distinct from each other. *Flowers III*, 947 So. 2d at 922, 927. Without the somewhat precariously secured fig leaf of observing juror demeanor during voir dire, the prosecutor may have decided not to tempt an appellate court to reverse for *Batson* error yet again in the event of a conviction and appeal.

profile the venire were, no *Batson* challenge was made to any of the strikes the state did employ.

45. The fact that the discriminatory methods used could not and did not succeed in disproportionately excluding African-Americans in the fourth trial, however, does not mean that in the fifth trial the State should be allowed more bites at the discrimination apple. Indeed, the State's racially discriminatory jury selection conduct over the life of this litigation including in the fourth trial indicates that, if given the chance to discriminate in jury selection in the next trial, the State will take it, even in the face of judicial condemnation for having done so.[17]

46. The evidence from four separate trials, summarized in Exhibit A, tells a compelling story of the

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[17] In the first and second trials – where there were fewer than 12 Blacks on the panel – the State apparently attempted to evaluate at least some white venire members individually and reject or accept on characteristics correlated to beliefs about the State's case, but made blanket racially determined decisions to reject all the Blacks it could. In the second trial, the court found the State racially discriminated in at least one of those strikes. In the third trial, it treated both groups categorically – accepting all white prospective jurors and rejecting all the African-Americans – and was reversed by the Supreme Court for doing so. In the fourth trial–where it had no statistical chance of preventing at least four African-Americans from serving – it did the same thing it had done in the first two trials, but in reverse: made blanket racially determined decisions to accept all available Whites as jurors, but made individual determinations with respect to African-Americans. In all its variations, however, this was "racially profiling jurors" in order to make its peremptory strikes, and that is what the Mississippi Supreme Court has expressly held that *Batson* condemns. *Flowers III*, 947 So. 2d at 939.

State's persistent racial discrimination extending over the entire course of this litigation. As that table makes clear, even including the five African-American jurors who served in the fourth trial, the State's tactics have succeeded in excluding 88% of the qualified African-American jurors available to try Mr. Flowers from serving on the juries selected to do so, while excluding fewer than 8% of the available qualified Whites from that participation.

47. It has achieved this stunning and statistically improbable result by exercising its peremptory strikes against African-Americans four times more often than it has exercised them against whites – by either using peremptories only against African-Americans or using them against Whites only where there are no remaining black jurors against whom the strikes might be employed, or by doing both. As a result, overall, only 13% of the jurors who sat in judgment on Mr. Flowers have been African-American, though they have been drawn from a pool of qualified venire members that has contained twice that proportion of qualified Blacks. Exhibit A. Twice, judges have found that the Stated [sic] has achieved these numbers by engaging in intentional racial discrimination. *Flowers III*, 947 So. 2d at 929, 936; [Fl. II Tr. 1347-49; 1355-63].

48. The evidence in the record allows no conclusion other than that the State has intentionally discriminated in the past, and has persisted in doing so even after being judicially told not to, and will continue doing so in the fifth trial if this court does not take the means for doing so from him in advance. The integrity

of the very process, as well as the dignity and civil rights of the citizens who present themselves for the often onerous duty of sitting in judgment on [sic] their fellow men and women, demands no less. *Powers v. Ohio*, 499 U.S. 400, 412 (1991); Georgia v. McCollum, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, (1991); *State v. Flowers*, 947 So. 2d 910 (Miss. 2007).

## II. MOTION IN THE ALTERNATIVE TO BAR THE SEEKING OR IMPOSITION OF THE DEATH PENALTY IN THE EVENT OF CONVICTION IF THE STATE IS PERMITTED TO USE PEREMPTORY CHALLENGES

49. Even if this court feels it cannot remedy the near-certainty of continued discriminatory abuse by the State of its peremptory strikes by premptively restricting or taking away its right to use them in the upcoming trial, it can still reduce the chance that abuse will occur by reproducing the conditions under which the state's discriminatory conduct has less chance of achieving a discriminatory result – i.e. by prohibiting the state from seeking the death penalty in this trial, as the state voluntarily declined to do in the fourth.

50. The defendant is filing herewith two other motions (Motion To Bar The Death Penalty Based On Prosecutor Vindictiveness And Misconduct and Motion To Bar Death Qualification Of Jurors) seeking this same remedy for other reasons as well, and incorporates the contents of those motions herein by reference.

However, even if this court were to deny those motions, it should grant the relief sought for the reasons set forth in this motion, alone.

51. As is set forth in some detail at paragraphs 39-46, and accompanying footnotes, *supra*, incorporated hereing [sic] by reference, the absence of the death penalty in the fourth trial resulted – despite the prosecutor's using potentially discriminatory methods – in the selection of a jury that was more racially diverse and proportionate to the pool from which it was drawn than any jury selected when the death penalty was on the table.

52. By contrast, when the death penalty is on the table, the juries that sat were grossly disproprionate [sic] to the racial make up of the pools from which they were drawn, overall showing an average of a mere 7% of the total jurors serving being African American, whereas the average pool from which they were struck was 24% black – a more than threefold disparity. Exhibit A.

53. Hence, even if the court feels it cannot abrogate a statutory right and restrict the prosecutor's use of his discretionary strikes, it can ameliorate much of the harm he might do by simply precluding the death penalty, and consequently precluding any death qualification of the jury or voir dire concerning death penalty attitudes, and thereby removing some of the most troubling tools for concealing *Batson* mischief that the Mississippi Supreme Court and the trial court in this very case have identified as having tainted the jury

selection in past trials. *See Flowers III*, 947 So. 2d at 929, 936; [Fl. II Tr. 1347-49; 1355-63].

54. The Defendant incorporates herein by reference the official record and Clerk's files of the four previous trials in this matter as they pertain to the selection of the juries in said trials, including all matters on file in the office of the Circuit Clerk of Montgomery County, Mississippi and/or under the custody of the Clerk of the Supreme Court of Mississippi, and seeks that these materials be made part of any record on appeal of any conviction obtained in the fifth or any other future trial of this matter in the event the relief sought in this motion is not granted in full.

WHEREFORE, premises considered, the defendant respectfully requests that this honorable Court bar the prosecution from using peremptory strikes at all, or at least from using them against non-white venire members during jury selection, or in the alternative that it bar the seeking or imposition of the death penalty in the event of conviction.

Respectfully submitted,

CURTIS GIOVANNI FLOWERS, Defendant

By: /s/ Andre de Gruy
Attorney for Defendant

Andre de Gruy, MB # 8679
Ray Charles Carter, MB # 8924
Alison Steiner, MB # 7832
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson, MS 39202
601-576-2316

[Certificate Of Service Omitted]

**EXHIBIT A**
**To Defendant's**
**Motion To Bar The Prosecution From Exercising Peremptory Strikes, etc.**
**(Filed Sep. 12, 2008)**

**Jury Selection Data – State v. Flowers 1997-2007**

| | Total | Black | % b | | White | |
|---|---|---|---|---|---|---|
| | | | of pool struck | of strikes used | | of po stru |
| ed | 36 | 5 | 14% | | 31 | |
| trikes | 12 | 5 | 100% | 42% | 7 | 23% |
| | 14 | 0 | 0% | | 14 | |
| | | | | | | |
| ed | 30 | 5 | 20% | | 25 | |
| trikes | 7 | 5* | 100% | 71% | 2 | 8% |
| | 14 | 1* | 7% | | 13 | |
| | | | | | | |
| ed | 45 | 17 | 38% | | 28 | |
| trikes | 15 | 15 | 100% | 100% | 0 | 0% |
| | 15 | 2† | 15% | | 13 | |
| | | | | | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| ed | 36 | 16 | 44% | | 20 | |
| trikes | 11 | 11 | 68% | 100% | 0 | 0% |
| | 14 | 5 | 36% | | 9 | |
| | | | | | | |

* The trial court found that all justifications advanced for the striking of one of the five African-American venire members tendered to the state during the second trial were pretextual. Therefore, though all five African-Americans were challenged by the state, one of them was nonetheless seated on the jury.

† Both African-Americans selected as jurors during the third trial were selected after the State had already exhausted all then-available peremptory strikes. Only one actually deliberated, however, after one of the two was disqualified for cause after being selected for the regular jury. He was replaced by one of the three white alternates selected after the State had exhausted all three of its available alternate-strikes on African-American venire persons.

‡ See above notes, which account for all three of these individuals.

§ See above notes, which account for three of these eight individuals.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, MISSISSIPPI

| | |
|---|---|
| STATE OF MISSISSIPPI | PLAINTIFF |
| V. | CAUSE NO. 2003-0071-CR |
| CURTIS GIOVANNI FLOWERS | DEFENDANT |

## NOTICE OF RENEWAL AND ADOPTION OF MOTIONS FROM THE PREVIOUS FIVE TRIALS

(Filed Apr. 9, 2010)

Comes now, Curtis Flowers, by and through the undersigned counsel and adopts and renews all motions filed in previous trials of this matter, and incorporates them and the renewal of them into the record of the instant sixth trial:

*First Trial*: (Motions filed during representation by Hon. John Gilmore)

1. Motion for Speedy Trial.
2. Motion to Control Prejudicial Publicity.
3. Assertion of Rights to Be Present.
4. Motion for Special Venire.
5. Motion for Process Instructions.
6. Motion for an Order Requiring that juror Questionnaires [sic] is Sent with Juror Summons to Each Prospective Juror.
7. Motion to Prohibit Jury Dispersal.

8. Motion to Invoke the Rule Prior to Voir Dire and to Enjoin District Attorney from Advising Witnesses of Previous Testimony.

9. Motion to Adjourn at a Reasonable Time.

10. Motion for Opportunity to Rehabilitate any Prospective Juror who Expresses Reticence when asked to Kill a Fellow Human Being.

11. Motion to Sequester Jurors Prior to and During the Trial of this case.

12. Motion to Preclude the Sheriff [sic] Department from Bringing the Defendant in Court in Shackles, and to Limit the Number of Uniformed Officers in the Courtroom While Sitting as Spectators.

13. Motion to Enjoin Victims' Family from Showing Emotion in the Courtroom while Sitting as Spectators.

14. Motion to Bar Admission of Inflammatory and Prejudicial Matters Concerning the Victim.

15. Motion for Discovery of any Possible Basis for Disqualification of the Prosecuting Attorney.

16. Motion for Disclosure of any Possible Basis of Judicial Recusal.

17. Motion to Preclude the Prosecution from Seeking to Rely on Miss. Ann. Section 99-19-101(7)(b),(c) and (d).

*Second Trial*: (Motions filed during representation by Hon. Chokwe Lumumba)

18. Motion to Preclude Admission of Gruesome and Highly Prejudicial Color Photographs of the Deceased.

19. Motion for Discovery of Information regarding State Experts.

20. Motion for Discovery of Information Necessary to Receive a Fair Trial.

21. Motion for Notice of Aggravating Circumstances and for Disclosure of Evidence Supporting Mitigating Circumstances.

22. Motion for Individual Sequestered Voir Dire.

23. Motion to Suppress Witness Statements.

24. Motion for Additional Peremptory Challenges.

25. Motion to Place Additional Questions on the Jury Questionnaire.

26. Motion to Dismiss for Violation of Defendant's Rights under MCA 99-17-1.

27. Motion to Bar Use of Certain Aggravating Circumstances.

28. Motions to Suppress Evidence.

29. Motion in Limine to Exclude Defendant's Prior Convictions from Evidence and Testimony.

30. Motion in Limine to Preclude Hearsay Testimony of Prosecution Witnesses

31. Motion to Suppress Statements.

*Third Trial*: (Motions filed during representation by Office of Capital Defense Counsel)

32. Motion for Twenty-Four Hour Cooling-Off Period, etc.

33. Motion to Preclude the State from Introducing Victim Impact Evidence

34. Motion to Sequester Jurors Prior To And During The Trial Of The Case

35. Motion for Rap Sheets and NCIC Reports

36. Motion to Discover Information Regarding Potential Jurors

37. Demand for Notice of Any Bad Acts That The State May Wish To Use At The First Phase Of This Trial

38. Motion to Assure that Mitigating Circumstances Receive Their Due Weight and Attention From The Jury

39. Motion To Disclose The Past And Present Relationships, Associations And Ties Between The District Attorney And His Staff To Law Enforcement Agengies [sic] And Prospective Jurors

40. Motion To Demur Or Quash Or Dismiss Indictment For Failue [sic] To Allege An Aggravating Circumstance, etc

41. Motion to Declare Miss. Code Ann. § 97-3-19(2)(e) Unconstitutional, etc

42. Motion For Order To Produce Kyles Information

43. Motion To Preclude Unreliable and Untrustworthy Snitch Testimony

44. Motion To Bar Trials On Untried Cases, etc

45. Motion For Jury Questionnaire

46. Objection To Proposed Juror Information Questionnaire And Suggested Changes

*Fourth Trial*: (Additional motions filed during representation by Office of Capital Defense Counsel)

47. Motion For Complete And Up To Date Criminal Histories Of Any Potential State's Witness

48. Motion For Disclosure Of Evidence Regarding "Snitch"

49. Motion To Produce Any And All Information Gathered By Any Agent Of The State Concerning The Homicides At The Tardy Furiture [sic] Company Including But Not Limited To All Information Generated As A Result Of Rewards And All Suspects Regardless Of Source Of Information

50. Motion To Preclude Introduction Of Victim Impact And Character Evidence

51. Motion To Determine Admissibility Of Testimony From Expert On Eyewitness Identification (with supporting affidavit)

52. Motion That The Judge Use Open-Ended And Non-Suggestive Questions When Querying The Jury On Views Of Death, Speak In The Alternative About Verdicts And Penalties That Might Be Imposed, And Minimize

Signals That The Prosecutor Is The Secondary Authority Figure In The Courtroom

53. Motion For Broad Leeway To Inquire About Publicity; About Actual Feelings, Opinions And Knowledge; About Juror's Ability To Adequately Accord Respect To Decision-Making Of Others; About Racial Bias; And To Probe Juror's Understanding Of The Concept Of Mitigation

54. Motion That Judge Not Telegraph Or Foreshadow Responses That Might Result In Disqualification Or Dictate To Jurors Any Requirement That They Must Follow The Law Before Fully Developing The Feelings, Biases, Opinions Or Prejudices The Juror May Hold With Respect To The Death Penalty

Fifth Trial: (Additional motions filed during representation by Office of Capital Defense Counsel, the request for hearings on which are all renewed as well)

55. Defendant's Statement Of Motions Adopted From The Previous Four Trials

56. Motion To Preclude "Death Qualification" Of Jurors Or In The Alternative To Preclude The Imposition Of The Death Penalty

57. Motion To Bar The Prosecution From Exercising Peremptory Strikes At All, Or At Least From Exercising Them Against Non-White Venire Members, During Jury Selection Or In The Alternative To Bar The Seeking Or Imposition Of The Death Penalty In The Event Of Conviction

58. Motion To Preclude Persons Who Have Previously Served As Jury Bailiffs From Serving As Such In The Present Trial

59. Defendant's Renewal Of, And Request For Hearing On, Motion To Determine Admissibility Of Testimony From Expert Of Eyewitness Identification

60. Motion To Bar The Death Penalty Based On Prosecutor Vindictiveness And Misconduct

61. Reservation Of Right To File Further Motions.

Defendant further renews and preserves all issues raised in motions filed after the fifth trial in this matter which have heretofore been ruled upon by the Court

Respectfully submitted,

CURTIS GIOVANNI FLOWERS,
Defendant

By: /s/ Alison Steiner
Attorney for Defendant

Ray Charles Carter, MB # 8924
Alison Steiner, MB # 7832
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson, MS 39202
601-576-2316

NOTICE OF HEARING

Please take notice that the above motion will come on to be heard before the Hon. Joseph Loper, Jr.,

Circuit Judge, in the Circuit Courtroom of the Montgomery County Courthouse on Tuesday, April 20, 2010 at 10:00 a.m., or as soon thereafter as counsel may be heard.

NOTICED this the 8th day of April, 2010.

/s/ Alison Steiner
Attorney for Defendant

[Certificate Of Service Omitted]

**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1036-1186 VOLUME 31 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

::::::

* * *

[792] And Number 17. Miss Chesteen.

JUROR PAMELA CHESTEEN: Yes, sir. Roxanne and I were friends in high school. I spent some time at their home.

And also, I knew Archie and Lola. And I know Archie and Lola and the girls and Archie, Jr., from the bank. And Shirley Golden.

THE COURT: And is Shirley Mr. Golden's widow?

JUROR PAMELA CHESTEEN: (Nodded.)

THE COURT: Would these factors influence you [793] or affect you in being a fair and impartial juror in this case?

JUROR PAMELA CHESTEEN: I will do my best.

THE COURT: Is there any doubt in your mind, but what you could lay anything – because, you know, it seems like you know family on both sides of the situation. And can you lay any of those factors aside and base your decision only on the evidence presented here in court?

JUROR PAMELA CHESTEEN: If it can be proven then I, I could go along whatever –

THE COURT: I mean you are going to follow the proof. And if it shows Mr. Flowers guilty, you would

vote that way. If it shows that he is not guilty, you will –

JUROR PAMELA CHESTEEN: (Nodded.)

THE COURT: Or if the State does not prove their case, you would vote him not guilty.

JUROR PAMELA CHESTEEN: (Nodded.)

MR. CARTER: I didn't hear that, ma'am. What was your answer?

JUROR PAMELA CHESTEEN: I will do my best to – I will go with whatever the evidence is, the proof.

THE COURT: What I'm saying, you would vote not guilty if the State didn't prove their case; is that correct?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: And then if the State proved beyond a reasonable doubt, you would vote that way.

[794] JUROR PAMELA CHESTEEN: (Nodded.)

THE COURT: So – okay. Thank you.

* * *

[861] I'll continue now with some questions from the Court.

I want to know if any of you are related by blood or by marriage to Derrick Stewart or if any of you knew

Derrick Stewart during his lifetime. I believe his nickname was Bobo. Are any of you related by blood or by marriage to Mr. Stewart or any of you that knew Mr. Stewart during his life, if you would please stand.

* * *

[862] And then Number 29. Mr. Waller, and you –

JUROR HAROLD WALLER: I just knew him through school. He went to school with my daughter. He was younger, but I know him and know his dad and mother and aunt.

THE COURT: And would that influence you or affect you in being a fair and impartial juror in this case?

JUROR HAROLD WALLER: No, sir.

THE COURT: And would you lay aside any knowledge you have of anybody and base your decision only on the evidence presented here in court?

JUROR HAROLD WALLER: Yes, sir.

[863] THE COURT: Okay. Thank you.

Then Number 50. Mr. Lester, and you knew Mr. Stewart.

JUROR BOBBY LESTER: Indirectly. My wife is a first grade teacher. He was in her class.

THE COURT: Would that influence you or affect you in being a fair and impartial juror in this case?

JUROR BOBBY LESTER: No, sir.

THE COURT: Okay. Thank you.

* * *

[905] Next one would be Dr. Steven Timothy Hayne. Do any of you know Dr. Hayne?

The next one would be Barry Eskridge. E-s-k-r-i-d-g-e.

Okay. Number 14. 17. And 18. And 5. Number 22. 29. 50. 50. 54. 58. 63. 67. 68. 69. 51. 76. 80. 80. 94. 111. 110. 120. 124. 121. 137. And 149.

Of those that have said that you know Mr. Eskridge, is there any of you that would give his testimony any greater or lesser weight and credibility than somebody you did not know or would the fact that he is a potential witness in this case influence you or affect you in any way in being a fair and impartial juror?

The next one would be Miss Melissa Schoene.

* * *

[906] And the next witness is going to be Bill Thornburg. He was sheriff in this county or deputy sheriff for a long time as well.

Okay. Number 6. 11. 12. 14. 17. And 18. 8. Number 38. 40. 22. 41. 42. 33. 34. 54. 29. 45. 44. 62. 59. 51. 50. 67. 72. 68. And 69. 76. 63. 91. 94. 93. And 92. 96. 80. 103. 123. 124. 126. 120. 115. 111. 98. 136. 137. 152. 121. 130. 110. 132. 127. 147. 128. 148. And 149.

[907] Now, those of you that know who Sheriff Thornburg is, would the fact that you know him cause you to have any greater weight – give his testimony greater weight or credibility of somebody that you do not know? Or would it affect you in any way in being a fair and impartial juror in this case?

* * *

[908] Elaine Gholston. Number 14 and 136.

Of those that know Miss Gholston, would the fact that she potentially could be a witness in this case influence you in any way or affect your ability to be fair and impartial or cause you to give her testimony greater or lesser weight and credibility than anybody [909] you do not know? Would that affect you in any way? Where is Number 14?

JUROR CAROLYN WRIGHT: No, sir.

* * *

Patricia Hallmon Sullivan Odom. Any of you know Miss Hallmon Odom?

Doyle Simpson.

Okay. Number 5. 14. 30. Did I see 30? Okay. 33. 17. 53. 50. 68. 44. 45. 62. 136. 95. 130. And 127.

Of those of you that know who Doyle Simpson is, would any of you be affected by his testimony where you [910] would give his testimony greater weight or credibility than somebody you did not know? Or would

that influence you or affect you in being a fair and impartial juror?

* * *

Odell Hallmon. Do any of you know Odell Hallmon?

Number 62, and would the fact that you know Mr. Hallmon influence you or affect you or cause you to give his testimony greater weight or lesser weight or credibility than somebody you did not know?

JUROR DIANE COPPER: No.

THE COURT: Okay. Thank you.

And Charles Porky Collins. Mr. Collins is deceased. He will be – his testimony will be read into evidence, but he will not be testifying live.

Number 56. I'm sorry. There are several of you. Number 5. 14. 16. 17. 11. 29. 50. 51. 22. 56. 68. 69. 72. 56. 75. 59. Number 80. 121. 137. 115. 76. 94. 91. 111. And 132.

Of those that indicated that you know Mr. Collins or knew him during his life, is there any of you that would give his testimony greater weight or credibility than that of somebody you did not know or would the fact that you know him be a factor or influence you in any way?

* * *

[912] The next person would be Jerry Dale Bridges. He is a constable in the county, and he is a

potential witness. Again, it is not positive, but he could potentially testify.

Number 2. And 6. And 12. 14. 16. 17. And 18. 8. 38. 40. 22. 26. 29. 33. 41. 42. 50. 51. 72. 54. 56. 44. 45. 59. 63. 62. 67. 68. 69.

* * *

Of those of you that indicated that you know Mr. Bridges, is there any one of you that would just by the fact that you know him automatically give his testimony greater weight or credibility than somebody that you did not know or would any of you be influenced where you could not be a fair and impartial juror by the mere fact that you do know Mr. Bridges?

The next one is Randy Keenum. Do any of you know Randy Keenum?

Okay. Number 17, 18, 22, 26, 29, 50, 68 and 69, 65, 80. I got 65.

* * *

[913] Of those of you that indicate that you do know Mr. Keenum, is there any of you that would give Mr. Keenum's testimony greater weight or credibility than that of a witness that you did not know? Or is there any one of you who because you might know Mr. Keenum that would influence you and affect you in being a fair and impartial juror in this case?

And Randy Stewart. I think his name has been mentioned as being related to one of the victims, Derrick Bobo Stewart. But if any of you know Randy

Stewart, who had not already raised your card or let us know that, then if you will do that at this time.

Number 29. And Number 50, 22. Anyone else?

And I'll ask this to those who just held their card up and also to those who earlier indicated they might know Mr. Stewart. Is there any one of you that would give his testimony greater weight or credibility than somebody that you do not know or would any of you have a situation where because you know Mr. Stewart it would affect you where you could not be a fair and impartial juror?

Next one – and I assume this would be Willie Golden, Jr., is that correct, from the State?

* * *

[915] And Bennie Rigby. I know Bennie Rigby's name has been mentioned as well. Anybody who has not already indicated that they know Bennie Rigby, if your card will please be held.

17. 18. 14. 33. 67. 69. 51. 108. 65. 120. 115.

For those of you who just held your cards up and those that have already indicated previously that you know Mr. Rigby, would any of you be affected by Mr. Rigby's testimony or give his testimony greater weight or credibility than somebody that you do not know? Or would his testimony in any way affect any of you in being a fair and impartial juror?

John Johnson. How many of you would know John Johnson?

Okay. That would be Number 2. 5.

I got, you, Number 5.

17. 18. 12. 22. 33. 38. 29. 50. 51. 54. 59. 62. 45. 67, 8 and 69. And 72. 124. 123. 121. 120. 119. 80. 115. 115. 137. 76. 95. 94. 111. 91. 132. 128. 127. 147. And 149.

For those of you that have indicated that you know Mr. Johnson, is there any of you that would give his testimony greater weight or credibility than somebody that you do not know? Or would the fact that he is a witness in this case influence or affect you in being a fair and impartial juror?

Okay. The next one would be Horace Wayne Miller. He is a retired investigator, I think, for the [916] Mississippi Department of Public Safety or State Highway Patrol, what we used to call the patrol. Any of you know Mr. Miller?

Okay. Number 11. 50. 29. 63. And 111. Those of you that know Mr. Miller, would the fact that you know Mr. Miller cause you to give his testimony greater weight or credibility than somebody that you do not know or would that in any way affect you in being a fair and impartial juror in this case?

Jessie Sawyer. Do any of you know Jessie Sawyer?

Okay. Number 8. 14. 17. 6. 33. 34. 44. 41. 45. 62. 50. 53. 69. 103. 121. 69. 65. 98. 136. 95. 110. 127. 128. 147. And 148.

Is there any of you that know Mr. Sawyer that just by the mere fact you know him it would affect you in

being a fair and impartial juror or affect – or would you automatically give his testimony greater or lesser weight and credibility than somebody that you did not know?

Sarah Barrentine. Any of you know Sarah Barrentine? Okay. That would be Number 5. 17. And 18. 50. 69. 80. 121. And 94.

Those of you that know Sarah Barrentine, would any of you give Miss Barrentine's testimony greater weight or credibility just because you know her or would that influence you or affect you in any way in being a fair and impartial juror in this case?

* * *

[918] Okay. Vincent Small. Any of you know Vincent Small.

Okay. 14. 16. 17. 18. Number 1. 6. 29. 33. 41. 44. 45. 50. 53. 62. 67. 68. 69. 72. 65. 120. Number 80. 115. 136. 137. 96. 95. 92. 94. 111. 149. 148. 128. 147. 127. And 110.

Of those of you that indicate you know Vincent Small, is there any one of you that would give his testimony greater or lesser weight or credibility than somebody you do not know? Or would any of you be influenced or have your ability to be fair and impartial influenced by the fact that you do know him?

James Taylor Williams.

Okay. Number 5. 2. 11. 14. 16. 17. 18. 22. 42. 29. 50. 54. 59. 67. 68. And 69. 72. 75. 76. 94. 111. 80. 115. 119. 120. 137. 108. 124. 121. 110. 132. And 149.

* * *

[920] THE COURT: Liz Vanhorn. Liz Vanhorn.

5. 14. 16. 17. 18. 22. 29. 33. 45. 62. 42. 57. 56. 51. 54. 53. 72. 50. 59. 63. 67. 68. And 69. 65. 75. 76. 87. 91. 92. 80. 108. 124. 121. 120. 119. 137. 136. 115. 95. 94. 96. 111. 147. 110. 127. 128. 132. 148. And 149.

Of those of you that know Liz Vanhorn, is there any one of you that would have a situation where you would give her testimony greater weight or credibility than somebody that you do not know? Or would the fact that she might be a witness influence or affect any of you in being a fair and impartial juror in this case?

Okay. How about Dennis Woods? Any of you know Dennis Woods?

Number 2. Number 5. Number 6. 14. 16. 17. 22. 25. 29. 33. 41. 50. 55. I'm sorry. 53. 57. 44. 45. 62. 67. 68. 69. 65. 91. 94. 95. 96. 92. 110. 119. 120. 115. 127. 128. 136 and 37. 111. 147. And 148. And 149. And 154.

Is there any one of you that know Mr. – the mere fact that you know who Mr. Woods is would affect you in [921] being a fair and impartial juror or where you would automatically give his testimony greater weight or credibility than somebody that you did not know just strictly because you do know Mr. Woods?

**Okay. Emmitt Simpson. Any of you know Emmitt Simpson? Okay. Number 14, 16, 17, 6, 33, 50, 53, 65, 110, 127, 147, 128, 136 and 118.**

**Of those of you that know Mr. Simpson, is there any of you that would give his testimony greater weight or credibility than somebody that you did not know, or would you automatically know that you could not be fair and impartial because of the possibility of him being a witness in this case?**

**Okay. How about Shawn Eskridge? Anybody know Shawn Eskridge?**

* * *

[922] **That would be Number 5. 14. 16. 17. 50. 54.72.**

**Is there any one of you that because you know Vera Latham you would automatically give Vera Latham's testimony greater weight or credibility than somebody that you did not know or would any of you have a situation where your ability to be fair and impartial was affected because of knowing Vera Latham?**

**Okay. And Frank Ballard.**

**Okay. Number 5. Some of you may have already spoken up. If you hadn't as to Frank Ballard –**

**Number 5. Number 12. 17. 22. 50. 25. 45. 65. 72. 69. 63. 137. 111. 94. And 149.**

**Of those of you that know Frank Ballard, is there anything about just the fact that you know him that**

would influence you or affect you in being a fair and impartial juror? Or is there any one of you that just because you know him that would affect you in being a fair and impartial juror in this case?

Mary Jeanette Fleming. Any of you know Mary Jeanette Fleming?

* * *

[923] JUROR CAROLYN WRIGHT: Mary Jeanette Fleming. Then Mary Ella Fleming.

* * *

THE COURT: Then Number 14, would the fact that you know Miss Fleming influence you or affect you in any way?

JUROR CAROLYN WRIGHT: No, sir.

THE COURT: Miss Wright, would that –

JUROR CAROLYN WRIGHT: Oh, no, sir.

THE COURT: Okay. Mike McSparrin. M-c-S-p-a-r-r-i-n. Mike McSparrin. Or McSparrin. Essa Ruth Campbell. Essa Ruth Campbell. Connie Moore.

Okay. 14. 16. 17. I got 14. 53 over there. 65. 45. 62. 134. 41. 110. 128. 148 and 147.

Of those of you that know Connie Moore, would the fact that you know Connie Moore influence you or affect you or in any way cause you to believe the testimony of Connie Moore over that of somebody that you did not know?

* * *

[924] Okay. Reverend Billy Little.

Okay. Number 29. Number 11. Number 126. Number 80. Number 132 and 111. And Number 18.

Is there any one of you that would just because you happen to know Billy Little, Reverend Little, that would automatically give his testimony greater weight or credibility than somebody that you did not know or would any of you have a situation where your ability to be fair and impartial would be tested or where you couldn't be fair and impartial because of knowing him?

[925] Okay. And this is another person whose name has been mentioned already. But if you haven't spoken up as to knowing her. Cora Felicia Flowers Tyson. Her last name is Tyson now apparently. Any of you that have not spoken up about knowing Felicia Flowers Tyson?

Okay. 33. 45. 62. 115. 110. 147. Are you just fanning, 14?

JUROR CAROLYN WRIGHT: No, sir.

THE COURT: Okay. 14. And 16.

For those and all – anybody else that might know Miss Flowers Tyson? Is there any one of you that would give her testimony greater weight or credibility than somebody that you do not know or would the fact that she was a witness in this case cause any of you to be where you could not be a fair and impartial juror?

* * *

Angela Flowers Jones. Any one of you know her that has not already spoken up?

Number 17 and Number 53.

And if Miss Jones is a witness in this case, is there any one of you that would let that influence you or affect you in being a fair and impartial juror or would [926] you give her testimony greater weight or credibility than that of someone you did not know?

Then I know we have already mentioned Lola Flowers. That's Mr. Flowers' mother. Is there any one of you that know her who have not already spoken up about knowing Miss Flowers? Is there any one of you –

Number 62, were you saying you knew Miss Flowers?

JUROR DIANE COPPER: I know her. His mother.

THE COURT: Okay. And anybody else or anybody that hadn't spoken up about knowing her already?

41. Okay. And Number 33.

Is there any one of you that know Miss Lola Flowers either that have held your card up or already indicated that because of knowing her you could not be a fair and impartial juror or would automatically give her testimony greater weight or credibility than that of somebody you did not know?

And Archie Flowers. Of course, I think it has been established that he is Mr. Curtis Flowers' father. Any of you know Archie that have not already spoken up previously?

Number 5. 6. 14. 16. 41. 33. 53. 41. 62. 69. 65. 94. 92. 115. 136. 138. 154. 128. And Number 147.

Those of you that know Archie and those of you that have spoken up already about knowing him, is there any one of you that because he might testify you would give his testimony greater weight or credibility than that of somebody you do not know? Or would you have any [927] difficulty being a fair and impartial juror because he might testify as a witness?

And next one would be Archie Renaldo Flowers. Is that – is that Mr. Curtis Flowers' brother, Defense Counsel?

MRS. STEINER: Yes, Your Honor.

THE COURT: Okay. Is he also known as Archie, Jr.?

MRS. STEINER: Yes.

THE COURT: Okay. Any of you know – I'll just call him Archie, Jr., because I have heard several refer to him that way today. Any of you that know him that have not already made that known?

Okay. Number 5. 67. 69. Number 6. Number 8. Number 34. 62. 136. 110. 127. 128. 147. 148. And 154.

Of those of you that know Mr. Flowers, is there any one of you that would have that influence you or affect you in being a fair and impartial juror or give his testimony greater weight or credibility than somebody that you do not know?

How about Crystal Gholston?

* * *

[928] Latarsha Blissett.

Okay. Number 5. Number 17. 62. 95. Number 50. Anybody else that knows Latarsha?

Of those of you that know Latarsha Blissett, would any of you have a situation where that would influence you or affect you in being a fair and impartial juror? Or would any of you give Blissett's testimony greater weight or credibility than somebody that you did not know?

Harvey Christopher Freelon. Anybody know Harvey Christopher Freelon?

Stacey Wright.

Number 5. 16. 8. 14. 16. 45. 41. 62. 95. 127. 148. 136. And 154.

Those of you that know Stacey Wright, is there any of you that would give Stacey Wright's testimony greater weight or credibility than that of somebody you did not know? Or is there any one of you that would be affected in any way by that?

* * *

[929] Alphonsos Alexander. Any of you know Alphonsos Alexander? Number 16. 17. 154. 137.

Anyone else?

Of those of you that know Alphonsos Alexander, is there any one of you that would give that testimony greater or lesser weight or credibility than somebody that you did not know? Or would any of you be influenced where you couldn't be fair and impartial if that person were to testify?

* * *

[930] Jimmy Lewis Forrest.

14. 16. 17.

A JUROR: Is he a reverend?

THE COURT: Ma'am.

A JUROR: Reverend Jimmy Lewis?

THE COURT: Is, is Jimmy Lewis a reverend?

MRS. STEINER: Yes.

THE COURT: Okay. He is. His title was written out here. 14. 16. 17. 33. 34. 53. 50. 44. 45. 62. 65. 80. 115. 98. 136. And 138. And 127. 110. 128. 147.

Of those of you that indicated that you might know Reverend Forrest, is there any one of you that would [931] automatically give his testimony greater weight or credibility, or any of you that would be influenced by

that testimony where you could not be a fair and impartial juror?

How about Nelson Forrest? Any of you know Nelson Forrest?

Okay. Number 14. 16. 17. Number 2. 33. 34. 44. 45. 50. 41. 53. 62. 68. 69. 72. 65. 80. 115. 98. 136. 137. 138. Did I say – no. Number 121. 94. 111. 110. 128. 127. 147. 149.

Of those of you that know Nelson Forrest, is there any one of you that just because you know Nelson Forrest would automatically give his testimony greater or lesser weight and credibility than somebody you do not know or would any of you have a situation where you could not be fair and impartial because of that?

* * *

[932] Okay. Anybody know Hazel Jones?

14. 16. 17. 18. 5. 33. 53. 50. 45. 41. 62. 65. 80. 115. 154. 87. 95. 94. 110. And 128.

Of those of you that know Hazel Jones, is there any one of you that would give Hazel Jones' testimony greater weight or credibility than somebody that you do not know, or is there any one of you that would have your ability to be fair and impartial where you couldn't be fair and impartial because of knowing Hazel Jones?

Henry Stansberry. Do any of you know Henry Stansberry?

Number 17.

Any one else know Henry Stansberry?

Would the fact you know Henry Stansberry influence you or affect you in being a fair and impartial juror, or would you give that testimony greater weight or credibility than somebody you did not know?

JUROR PAMELA CHESTEEN: No.

THE COURT: Okay. Robert Merrit.

Number 5. 16. 6. 29. 53. 95. 127. 154. And 136.

Of those of you that know Robert Merrit, is there any one of you that would have that affect your ability [933] to be fair and impartial or give his testimony greater weight or credibility than somebody you did not know? Larry Smith. Okay.

I believe you two know everybody. And I appreciate you holding your hand up every time, but y'all are obviously well-known and well-liked people in the county.

14. 16. 41. 62. 69. 95. 115. 110. 127. 147. 128. 148. 137.

Of those of you that know Larry Smith, is there any one of you that would give that testimony greater weight or credibility than somebody that you did not know, or would any of you have a situation where you just feel you couldn't be fair and impartial if Larry Smith was a witness?

Frances Hayes. Anybody know Frances Hayes?

And number 14. 16. 62. 80. And 115.

Of those of you that know Frances Hayes, is there any one of you that would automatically give that testimony greater weight or credibility that you – of somebody that you did not know? Or is there any one of you that could not be fair and impartial because of that?

Robert Campbell.

Latoya Campbell Harding.

Kittery Jones. Okay. Number 5. 16. 17. 95. 53. And 72.

Of those of you that –

And 154.

Of those of you that know Kittery Jones, is there any one of you that feel like you would give that [934] testimony greater weight or credibility than somebody you did not know, or is there any one of you that would be influenced where you couldn't be fair and impartial just because of knowing Kittery Jones?

JUROR CAROLYN WRIGHT: Excuse me.

THE COURT: Yes, ma'am.

JUROR CAROLYN WRIGHT: I know Kittery.

THE COURT: And you're Number 14. Okay.

JUROR DIANE COPPER: I know him.

THE COURT: And Number 62. I'm sorry. I didn't get the hand of you two.

But would the fact that you know Kittery Jones influence any of you or affect you where you would give that testimony greater weight, credibility or would that affect you where you couldn't be fair and impartial?

Okay. Danny Joe Lott.

Okay. 14. 16. 33. 53. 44. 62. 136. 41. 57. 92. 127. And 148.

Of those of you that know Danny Lott, Danny Joe Lott, is there any one of you by the fact that you know him that would influence you or affect you where you could not be a fair and impartial juror? Or would any of you give his testimony greater weight or credibility strictly because you know him and would not possibly know some other witnesses?

Ray Charles Weems.

14. 33. 16. 53. And 65. 62. 136. 41. 128. And 127. And 41.

Of those of you that know Ray Charles Weems, is [935] there any one of you that would – the fact that you know Ray Charles Weems that would influence you or affect you in being a fair and impartial juror or influence you in any way or affect you where you would give his testimony greater weight or credibility than somebody that you did not know?

Okay. Denise Kendle. K-e-n-d-l-e.

14. 16. 17. 53.

Of those of you that know Denise Kendle, is there any one of you that would give that testimony greater weight or credibility than somebody that you did not know or would you tend to believe that testimony? Or would that in any way influence you in being fair and impartial?

Okay. Erving Bays. Erving Bays.

* * *

[955] And now I will tender the panel and allow the State of Mississippi to begin asking questions.

Mr. Evans, you may proceed.

**BY MR. EVANS:** Thank you, Your Honor. Good morning, ladies and gentlemen.

**BY JURORS:** Good morning.

**BY MR. EVANS:**

**Q** There are a few things that I want to go through that the judge didn't, and a few things that I want to go just a little further into that he did.

Before we do that, I am Doug Evans, your district attorney. I think some of y'all know me and some may not. Clyde Hill, one of the assistants, will be helping me; and Mike Howie, another assistant, will be helping in the trial.

Now, voir dire is strictly just an attempt to find out a little something about the jurors so that we can make sure that we get a fair and impartial jury, because the jury that sits on this case needs to listen to only the

evidence and the witnesses that come forward in court. You need to able to disregard anything else that you may know or you may heard – have heard. Anything outside the courtroom needs to be dropped at the door, and you need to come in here with an open mind.

* * *

[958] I know there were some of you the other day that were talking about not being able to judge. And at this point, we're not getting into what the penalty is. But is there anyone still out here that just feels like that they could not judge someone?

And basically, what we would get to – if we were to have a situation if that were true – that we would have a juror or jurors that would have the feeling. Well, I just don't think it's right for me to judge someone, and we would go through a week of trial and then that juror in the jury room throw up their hands and say, I'm sorry, I just don't think it's right for me to judge. So we wouldn't be able to complete what we're here for. So is there anyone here that even thinks that they could not judge someone?

* * *

[960] Okay. Yes, ma'am. What is your number, please?

**A** 45. **(Juror No. 45, Edith Burnside)**

**Q** No. 45? Okay. Ms. Burnside. And you also feel that you could not judge anyone?

**A** I can't. I don't feel like I can.

**Q** You just could not judge anyone; it wouldn't matter what the case was?

**A** No, sir.

**Q** Okay. No. 128, Mr. Moore?

* * *

[964] **Q** How many of you had ever shopped at Tardy Furniture?

(JURORS RAISE HANDS)

**BY MR. EVANS:**

**Q** Okay. Pretty good many. How many of you had accounts with the store, charge accounts?

14. I'm sorry. 75. And wasn't there one more? 45. And 62. All right. Of the ones of you that had accounts there – and I know – I hate to even ask some of these questions, but it is things we need to know. Did Tardy Furniture ever have to sue any of you for those accounts? Nobody? No. 45.

**A** Sir, can I say something on that? **(Juror No. 45, Edith Burnside)**

**Q** Ma'am?

**A** Can I say something on that as to why I was –

[965] **Q** Well, the question was just were you ever sued.

**A** Okay.

**Q** Not going to get into what was owed or anything else.

**A** Or whether it was paid off or anything?

**(Juror No. 14, [966] Carolyn Wright)**

**BY MR. CARTER:** I object, Your Honor. She ought to be able to ask her question or whatever she has.

**BY MR. EVANS:** If it's in response to the question.

**BY THE COURT:** If you'll stand up, ma'am, because the court reporter's – see, she's typing everything that's spoken and she can hear you better if you stand up.

**A** I had an account there, but I was not sued by Ms. Bertha. It was later on when it was took over by Mr. Frank and Roxanne. **(Juror No. 45, Edith Burnside)**

**Q** I think I've got where it was sued by Tardy Furniture; is that correct?

**A** (Nodding head).

**Q** And that was the question: Were you ever sued by Tardy Furniture? All right.

And No. 14, Ms. Wright. I believe you were, in fact, sued by Tardy Furniture. Is that correct?

**A** Yes. But it was paid off. **(Juror No. 14, Carolyn Wright)**

**BY THE COURT:** Would you speak up? I could not hear that.

**A** Yes, sir.

**BY MR. EVANS:**

**Q** You were sued, and there was a judgment against you?

**A** Yes, sir.

**Q** And none of this is meant to embarrass anybody. It's just questions that we need to ask.

All right. I want to go back through a little bit about the ones of you that may have not answered or that we didn't develop enough on the relationships with the Defendant, Curtis Flowers, and his family. I know a lot of you the other day – a lot of the ones that were here did answer. There were a lot of relatives of his. Most of those are not here now because they said that they could not be fair and impartial.

Is there anyone else here as far as being related to him or his family – and just for – briefly, to make sure that everybody understands, his father is Archie Flowers. His mother is Lola Campbell Flowers. He has one brother, Archie Flowers, Jr. One sister, Angela Jones. Another sister, Felicia – I think it's Tyson. Another sister, Prisilla Ward. And then another sister, Sherita Baskin. I think that there's been testimony already that they are related to Mr. Nelson Forrest, [967] Ms. Hazel Jones and Johnnie Mae Woods.

Now, knowing that, is there anyone still here that is related to any of those individuals?

Yes, ma'am. No. 53. And who are you related to?

**A** Angela is my niece. **(Juror No. 53, Flancie Jones)**

**Q** Who is your niece?

**A** Angela. And one you named is my sister-in-law. Who did you say his aunt was?

**Q** Ms. Hazel Jones –

**A** Hazel Jones is my sister-in-law.

**Q** Hazel Jones is your sister-in-law?

**A** She's a Ward.

**BY THE COURT:** Ms. Jones, I couldn't hear all – you had said something about somebody named. Angela? And I did not get –

**BY JUROR:** Angela is my niece.

**BY THE COURT:** What's Angela's last name now?

**BY JUROR:** She was a Ward, but she married a Jones.

**BY THE COURT:** Okay. That's the defendant's sister?

**BY JUROR:** I didn't know that was his sister.

**BY THE COURT:** Okay. And that's your niece?

**BY JUROR:** It's my nephew's wife.

[968] **BY THE COURT:** Okay. And then who was – is that the only one – I wasn't clear. Is that the only one whose name you recognized that he called?

**BY JUROR:** (Nodding head.)

**BY MR. EVANS:** She stated a Hazel Jones also, which is a sister to, I think, Ms. Lola Flowers.

**BY THE COURT:** Okay. And what was your connection with Ms. Hazel Jones?

**BY JUROR:** She's my – she's my husband's brother's wife. **(Juror No. 53, Flancie Jones)**

**BY THE COURT:** Okay.

**BY MR. EVANS:**

**Q** How often do you see these?

**A** I don't.

**Q** You don't see them?

**A** (Shaking head).

**Q** Is there anything about those relationships that would make it difficult for you to be fair and impartial?

**A** No.

**Q** And I think you also said that you knew – in addition to Angela, you knew Archie, Sr., Nelson Forrest, Hazel Jones, Danny Joe Lott. Is there anything about that that would affect you this case?

**A** No.

**Q** Okay. Thank you, ma'am.

* * *

[970] **Q** The information we have is that the Defendant and his family and Connie Moore have lived in the areas around Silver Street, McNutt, Harper and Cade. Have any of y'all ever lived in any of those areas? No. 62? Yes, ma'am.

**A** Where –

**BY THE COURT:** If you'll please stand when [971] you're responding.

**A** I live on – used to live on Harper. **(Juror No. 62, Diane Copper)**

**Q** On which street?

**A** Harper.

**Q** Okay.

**BY THE COURT:** And what street is that again?

**A** Harper.

**BY THE COURT:** Harper. Okay.

**A** Yes, sir.

**BY MR. EVANS:**

**Q** How far away from the Flowers did you live?

**A** Not very far.

**Q** Just a few houses?

**A** No. Probably about two blocks or so.

**Q** About two blocks. Would you see them very often?

**A** Not too often.

**Q** Is there anything about being a neighbor of theirs that would affect you in this particular case?

**BY MR. CARTER:** Your Honor, I object. I don't think that makes her a neighbor.

**BY MR. EVANS:** I think anybody could understand that. You may answer.

**A** Of course, I don't live on that street.

**Q** But what I'm asking is there anything [972] about the fact that you were a neighbor of theirs that would affect you in this case?

**BY MR. CARTER:** Same objection.

**BY THE COURT:** Well, I think she can classify neighbor however – you know, the State may classify somebody two blocks away as a neighbor. Then out in the country, you might consider somebody two miles away to be your neighbor. So, you know – but she can answer, I think, based on the question.

**A** No. No it wouldn't be a problem.

**BY THE COURT REPORTER:** I'm sorry. Speak up.

**A** No. It wouldn't be a problem.

**BY MR. EVANS:**

**Q** It wouldn't be a problem?

**A** No.

**Q** Do you still see the Flowers?

**A** Sometimes. I work at Wal-Mart, so sometimes they come in there and – you know, shopping.

**Q** You work with Archie at Wal-Mart; is that correct?

**A** Yes, sir. **(Juror No. 62, Diane Copper)**

**Q** And you also work with one of the defendant's sisters?

**A** That's correct.

**Q** Which sister do you work with?

**A** Cora Flowers.

[973] **Q** Cora?

**A** Yes, sir.

**Q** How long did you work with Cora?

**A** I can't remember the exact – probably about a year or something like that.

**Q** Okay. Were y'all pretty close?

**A** It was more like a working relationship, you know.

**Q** Did you ever visit with each other?

**A** No, sir.

**Q** Okay. But you did work with two of his family members, and you lived within a couple of blocks of the Flowers' residence. You do not think that any of that would affect you?

**A** I don't think so.

**Q** But I need you to – like the judge said, we need you to be positive. Could that affect your thinking in the case?

**A** It could.

**Q** Okay. Do you think that that may cause you to lean toward the defendant in the case?

**A** Yes, sir, it's possible.

**Q** Okay. Thank you, ma'am.

**A** Can I mention something else?

**Q** Yes, ma'am.

**A** My husband used to work down there at Tardy, too, but it was – I don't remember what year, but it was right before the incident happened.

What's your husband's name?

[974] **A** John Copper.

**Q** Okay.

**A** He just helped deliver.

**Q** Okay. Do you know about how long before?

**A** How long?

**Q** How long he worked there before the murders?

**A** No.

**Q** Would it have been –

**A** Probably – maybe late '80s or '90s, early –

**Q** Okay. So it had been several years before; is that right?

**A** Yes, sir.

**Q** But he did work for Mr. and Mrs. Tardy?

**A** Yes, sir. **(Juror No. 62, Diane Copper)**

**Q** All right. Thank you, ma'am.

And No. 45. Yes, ma'am?

**A** I live on the – around on the next street, from McNutt Street. **(Juror No. 45, Edith Burnside)**

**Q** Okay. Which street was that? Which direction?

**A** I been trying to think. It's been a long time. I cannot remember. It was the project, and I stayed over

on the next street. McNutt was behind me. I was in the front.

**Q** All right. When was that?

**A** It's been '96 when this happened? Right?

[975] **Q** Right.

**A** Okay. I was living there in '96.

**Q** Okay.

**A** On the next street.

**Q** Did you know Connie Moore?

**A** Just – I know her – we went to the same beauty shop and stuff like that, but I never visit her house or nothing like that.

**Q** All right. And you did know the Defendant. I think you said that the Defendant visited in your home?

**A** Yes. Him and one of his sisters have, yes. **(Juror No. 45, Edith Burnside)**

**Q** Okay. Which sister was that?

**A** Prisilla Flowers.

**Q** So not only did they visit in your home, but you said that he was real close with both of your sons?

**A** They played ball and stuff together.

**Q** All right. And would that affect you? Would you think about that if you were picked as a juror? If

you listened to the evidence and was asked to decide his guilt or innocence, would the fact that he's been to your home and he's close to your family and his sister, too, would that affect you?

**A** No, sir.

**Q** Okay. Thank you, ma'am.

* * *

[985] which sister do you work with?

**A** I works with Prisilla Ward.

**Q** All right. And are y'all friends?

**A** Yes. **(Juror No. 6, Glenn Trotter)**

**Q** Okay. But you're basically friends with the entire family?

**A** Right. I know just about all – you know.

**Q** And I think from my notes back in 2007, you said you were very close friends and you could not be fair and impartial because of that?

**A** Right.

**Q** Is that still true?

**A** Yes.

**Q** All right. Thank you, sir.

No. 5, Ms. Griffin. I know you pretty well know everybody around that's involved in it. Is that strictly because of just being a teacher?

**A** Yes.

**Q** Is there anything – **(Juror No. 5, Carol Griffin)**

**A** And church.

**Q** Teacher and church. Is there anything, other than that, that would affect you in this case about knowing him and any of the defendant's family?

**A** Other – nothing other than what I said a while ago.

**Q** Okay. And I've got that down. You don't feel like on this particular case you could be fair and impartial?

* * *

[986] No. 8, Mr. Robinson. I think the only family member that you said you knew was Archie Jr; was that right?

**A** Right. **(Juror No. 8, Alexander Robinson)**

**Q** How do you know him?

**A** I was – go to Auto Zone.

**Q** To Auto Zone? Okay. So it's just a working relationship, know where he works?

**A** Right.

**Q** Is there anything about that that would affect you?

**A** No, sir.

**Q** And you could base your decision strictly on the evidence?

**A** Right.

**Q** Thank you, sir. Okay. No. 17, Ms. Chesteen?

**A** Yes, sir. **(Juror No. 17, Pamela Chesteen)**

**Q** You have stated that you knew Mr. and Ms. Flowers and I think Nelson Forrest. Is there anything about those relationships that would affect you in this particular case?

**A** No. I've waited on them all at the bank as my customers. Most of the Flowers' family.

[987] **Q** So it's just strictly – like Mr. Robinson, just a working relationship?

**A** Yeah.

**Q** All right. Thank you, ma'am.

Okay. No. 44, Ms. Cunningham. You work with Sherita at ADP; is that right?

**A** Yes. **(Juror No. 44 Tashia Cunningham)**

**Q** And I – as a matter of fact, I think y'all work side by side there, don't you?

**A** No, sir.

**Q** You work the same line?

**A** We work the same line, but she did –

**BY THE COURT:** Who did you say, Mr. Evans?

**BY MR. EVANS:** Sherita.

**BY THE COURT:** Sherita.

**BY MR. EVANS:**

**Q** But you see her every day at work?

**A** Sometime, not all the time.

**Q** How would you not see her?

**A** She works at the front of the line, and I work at the end of the line.

**Q** Okay. And y'all are friends, aren't you?

**A** No.

**Q** You're not friends?

**A** Just a working relationship.

**Q** Okay. How long have you worked with her?

**A** I've been there five years.

**Q** How long has she been there?

**A** I have no idea.

[988] **Q** Was she there when you got there?

**A** She was there on – when I came, she was on third shift when I started.

**Q** How long have y'all been working the same shift?

**A** Probably about two or three years.

**Q** Okay. And let's see. I believe you stated that you knew Mr. Nelson Forrest and Reverend Lewis?

**A** Yes.

**Q** Is there anything about those relationships that would affect you?

**A** No.

**Q** All right. As far as Sherita, if you were picked as a juror on this case, do you feel that if you found from the evidence that he was guilty and voted guilty that you would owe her any explanation?

**A** No.

**Q** Okay. You don't feel that that would affect you at all?

**A** No.

**Q** All right. Thank you, ma'am.

No. 50, Mr. Lester. And I think – I'm going to make sure I got my notes right. You said that the knowledge you had of the different people involved was from a working relationship, too; was that correct?

**A** The ones involved, are you talking about – **(Juror No. 50, Bobby Lester)**

[989] **Q** Well, the possible witnesses?

**A** Yes.

**Q** Like –

**A** Yes.

**Q** Okay. Ms. Jones, Nelson Forrest?

**A** Yes.

**Q** Reverend Lewis?

**A** Yes. I work at the bank where Pam does, and we see everyone in town.

**Q** Yes, sir. That's your only knowledge of these people. Nothing about knowing who they are that would affect you in this case?

**A** No, sir.

**Q** All right. Thank you, sir.

No. 53, Ms. Flancie Jones. All right. You've stated that – let me just ask you again: What is the relationship? How are you related to the defendant?

**A** To him? **(Juror No. 53, Flancie Jones)**

**Q** Right.

**A** The last time I was here, the Court told me that he was my sister-in-law's sister's son. I didn't even know that.

All right. But you are related to him?

**A** I – some – I'm – by marriage.

**Q** All right. And I may have not gotten them all because I think I ran out of room here. You said that you knew Angela Flowers?

**A** Angela is married to my nephew.

[990] **Q** Okay. And what's your nephew's name?

**A** Mark Jones.

**Q** Mark Jones?

**A** (Nodding head). If we're talking about the right Angela.

**Q** Okay. And you know Archie –

**BY MR. CARTER:** Your Honor, can we clarify which Angela for the record?

**BY THE COURT:** Well, I don't know if we can or not. I mean, she said –

**BY MR. EVANS:**

**Q** You know who Angela Flowers is, don't you?

**A** Is it Angela Ward? She was a Ward before she married? **(Juror No. 53, Flancie Jones)**

**Q** (Nodding head).

**A** Uh-huh.

**Q** Okay. And you also know Archie, Sr; is that correct?

**A** No.

**Q** I may have written that down wrong. You know Connie Moore?

**A** I've heard people talk of her because I'm really not from Winona here. I'm from Duck Hill, and I went to Kilmichael schools. So a lot of people here, I do not know.

**Q** But I think yesterday you said you did know her?

**A** I think I might. Because I hear people saying that she going to get married, you know, at [991] the places I work? As far as knowing her, I don't really know her. I just know her when I see her.

**Q** Nelson Forrest?

**A** I went to school with a lot of Forrests. I don't know which one it was.

**Q** Hazel Jones?

**A** Hazel is my sister-in-law.

**Q** Okay. All right. And Hazel Jones, I believe, is the Defendant's aunt. So you're connected with him in several ways; is that right?

**A** I guess. **(Juror No. 53, Flancie Jones)**

**Q** Now, knowing that, knowing that you are related to him and these different connections, would that affect you? Would you think about that –

**A** It wouldn't affect me, because I have no relationship with any of them.

**BY MR. EVANS:** All right. Thank you, ma'am.

**BY THE BAILIFF:** Mr. Evans, we've got – we need a jury break, if possible, please.

**BY MR. EVANS:** Okay. Is that all right, Your Honor?

**BY THE COURT:** Ladies and gentlemen, we'll recess for ten minutes.

* * *

[1002] **BY MR. EVANS:** Your Honor, may I have the Court's indulgence for just a minute?

(PAUSE)

**BY MR. EVANS:** I tender the panel to the Defense.

* * *

[1027] No. 45. Ma'am, like the others, I understand that you're uncomfortable sitting in judgment of other people. And again, a lot of us are that way, if not all. You don't have anything against the Goldens, the Rigbys, the Tardys or the Stewarts, do you?

**A** No, sir. **(Juror No. 45, Edith Burnside)**

**Q** Or any of their relatives?

**A** No, sir.

**Q** And you don't have anything against Mr. Flowers, do you?

**A** No, sir.

**Q** And I believe you said you know some of his family members?

**A** Yes, sir.

**Q** However, if you got picked as a juror for this case – and only you know the answer to this – and you were told you should make your decisions – your verdict should be based on the evidence that comes from the witness stand and not on anything you [1028] heard outside the court or not based on any relationships you had with anybody else, could you, in fact, listen to the evidence as it comes from the witness stand and make your decision based on the evidence as it comes from the witness stand only?

**A** Yes, sir. **(Juror No. 45, Edith Burnside)**

**Q** Thank you.

No. 14. Now, do you have anything against the Tardy family or her daughter or other children?

**A** No, sir. **(Juror No. 14, Carolyn Wright)**

**Q** And you don't have anything against the Rigbys, the Goldens, or the Stewarts, do you?

**A** No, sir.

**Q** And despite the fact that you had an account at Tardy at some point that I assume that got worked out some kind of way, that – that didn't cause you to

have any – any dislike or any ill will toward them; is that correct?

**A** No, sir.

**Q** If you got – do you have any anything against Mr. Flowers?

**A** No, sir.

**Q** Or his family?

**A** No, sir.

**Q** So if you got picked as a juror to serve in this case, you would – could you listen to the testimony and evidence that comes from the witness stand, and the witness stand only, and make a decision as to Mr. Flowers' guilt or innocence?

[1029] **A** Yes, sir. **(Juror No. 14, Carolyn Wright)**

No. 45. You didn't say you had been sued by Tardy, did you?

**A** I did. **(Juror No. 45, Edith Burnside)**

**Q** Okay. Could you stand? Even though you got sued, did that cause you to have any ill will or malice toward Tardy Furniture or the Tardy children or family members?

**A** No. I worked for them, so no. No.

**Q** I'm sorry. You worked for them at some point, and you don't have anything against them or the Stewart or the Rigbys or anybody else?

**A** No, sir.

**Q** You could be fair to both sides?

**A** Yes, sir.

**Q** Thank you.

And No. 62. Ma'am, you had an account with the Tardys – the Tardy Furniture at some point; is that correct?

**A** Yes. Well, it was more like on my husband – he was the one that had got some [1030] furniture from them, so it was in his account. Well, in his name. **(Juror No. 62, Diane Copper)**

**Q** Your husband, you say?

**A** Yeah.

**Q** Okay. Now, you – you or your husband didn't get sued, did you?

**A** No, we didn't.

**Q** Thank you.

No. 62. Ma'am, you said – could you stand again? You said that you – now, you lived near the Flowers at some point. Well, I don't know if I want to say near, but you lived –

**A** Not very far from – not too far from where they lived. **(Juror No. 62, Diane Copper)**

**Q** All right. They didn't live next door to you, did they?

**A** No.

**Q** And your husband used to work at Tardy's?

**A** Yes.

**Q** Okay. You could be fair to both sides, is that correct, despite that?

**A** Yes, sir.

**Q** Thank you.

* * *

[1037] No. 17. Correct me if I'm wrong, Ms. Chesteen, did you say you were friends with Roxanne?

**A** In high school, we were friends. **(Juror No. 17, Pamela Chesteen)**

**Q** And I believe you said you visited in Roxanne's house?

**A** I did some.

**Q** And I believe you said you know some of the Flowers?

**A** (Nodding head).

**Q** You know the Goldens?

**A** (Nodding head).

[1038] **Q** And I believe you said you would try your best to be fair. Well, let me ask you this – now correct me if I'm wrong now, because I have a sense of friendship that I don't want to appropriate to you my means of friendship, so correct me if I'm wrong.

Now, I would have a hard time finding against my friend. Are you telling us that despite the fact that Roxanne is your friend and having lost her mother and other wonderful people, for all I know, in such a horrible way, that you could sit in judgment of Mr. Flowers and not let that affect you?

**A** I can tell you that I hurt for all the families, every one of them. Honestly.

**Q** I believe you.

**A** And I do believe I could sit and listen and have an open mind.

**Q** But can you tell me that friendship with Roxanne won't play any role at all, absolutely won't play a role?

**A** No, I can't say that. **(Juror No. 17, Pamela Chesteen)**

**Q** Can't say that. Thank you.

**BY THE COURT:** Are you saying no, you can't say –

**BY JUROR:** No, I'm saying no, that I don't believe it would have a role.

**BY MR. CARTER:**

**Q** I'm sorry. Could you stand up? I'm sort [1039] of confused there. You said – you're saying – or are you saying that despite – how old were you when your friendship with Roxanne started? Do you know?

**A** I don't know. Probably 15 or 16.

**Q** And that friendship is – remain the same or – what would be fair to say?

**A** I don't talk to Roxanne. Only when I see her somewhere, I speak to her.

**Q** Okay. But you still consider her your friend?

**A** Surely.

**Q** Still your friend? And your final answer was that despite the friendship, that you could sit in judgment of this case, and the friendship with Roxanne won't play any role whatsoever?

**A** That's right.

**Q** All right.

* * *

[1075] MR. CARTER: Thank you.

Bill Thornburg. Anybody relative of Jack Matthews? David Balash. Joe Edward Andrews. Elaine Gholston.

JUROR CAROLYN WRIGHT: She is not related to me, but her husband is my first cousin.

**MR. CARTER: Is it fair to say that that [1076] relationship wouldn't cause you to be unfair to Mr. Flowers? Or would that relationship affect you and cause you to give her testimony more credibility and believability than you would anybody else's?**

**JUROR CAROLYN WRIGHT: No, sir.**

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1036-1186 VOLUME 31 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1095] MRS. STEINER: Your Honor, before we commence individual voir dire.

Your Honor, I believe the individual voir dire, as understand, is going to go into both publicity and death penalty.

THE COURT: Right.

[1096] MRS. STEINER: And before we commence, I would like to renew some motions we had previously made with respect to barring, seeking or

imposition of the death penalty, which would preclude the need for that.

The first motion I would like to renew is the motion – I think it was re-renewed in April – that was filed in September of 2008 just prior to fourth trial in this matter to preclude the prosecution from seeking imposition of the death penalty in this matter largely on the basis of the documented history through – in, in the courts.

The first three trials of racial discrimination, as set forth in that motion, which was considered by the Court previously and today, the experience of the means in the areas which the State is inquiring, practicing prosecutorially as cross-examining African-American jurors, particularly the ones whom have been identified as having had civil disputes with Mrs. Tardy's business.

THE COURT: What does that have to do with the death penalty?

MRS. STEINER: And this is part and parcel –

THE COURT: What does that have to do with the death penalty?

MRS. STEINER: Yes, Your Honor. This is part and parcel of the misconduct that in the 2008 motion we had cited as a basis to preclude the death qualification, which we anticipate they will continue in the same vein.

And on that basis, we would move on grounds set forth in the 2008 motion and as carried out that there's [1097] a long discussion in that motion of ways in which discrimination has been occurring. And I think the way that the State has been handling its voir dire to date, that has continued, and that at the very least the death penalty should be precluded.

We would also renew the motion that inherently given – what's set forth in juror questionnaires, I believe that there will continue to be a racially discriminatory effect, as there was in the last four trials, in terms of reducing the proportion of African-American jurors statistically, significantly in this juror pool.

* * *

[1101] MRS. STEINER: Thank you, Your Honor. I take it you are overruling the motion again.

THE COURT: I am overruling on the idea of prosecutorial misconduct that would preclude them from seeking the death penalty, because there has been no showing that there was any prosecutorial misconduct. And again, the reason why they didn't seek the '07 death penalty then was because of an agreement between your office and them that if you didn't seek to have this expert on identification, they would not seek the death penalty. That was clear from the record back then.

Also, I don't agree with your characterization that the State has made discriminatory questions today about – during the jury selection. The State asked [1102] everybody that was on the panel if they had ever

been sued by Tardy Furniture company. That did not single out a person that was black, a person that was white.

They first asked if there was people that had charge accounts there. There were a number of white people and black that said they did. And then they asked if anybody had ever been sued. You know, I think it was two or three black jurors that said they had been. But that was not anything that was suggestively racist or racial in any way. So I do not see that their questioning today has had anything dealing with race.

This case is not about black and white. It is right or wrong and guilt or innocence is what this case is about. And as I say, up to this point, I have not seen any issue that would indicate that there is anything discriminatory about any question that they have asked.

Also, the case law at this point in this state is clear that, you know, you can exclude people under *Witherspoon* if they say they cannot consider under any circumstance the death penalty. If it disproportionally results in one group of people being excluded because of that, that is the law. And I'm sworn to uphold the laws of the State of Mississippi, and I do my dead level best to follow the precedents that have been set by the Supreme Court of Mississippi and the Supreme Court of the United States. And based on that, I do not see any merit to your motion. So it is denied.

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1036-1186 VOLUME 31 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

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And I first want to know if you have any knowledge about this case, heard anything about the facts of the case or, you know, discussed it or heard it discussed, read about it in the newspaper, seen it on t.v., newspapers, Internet or anywhere else.

JUROR CAROLYN WRIGHT: Yes. Yeah.

THE COURT: And can you tell us how you heard about the case?

JUROR CAROLYN WRIGHT: T.V. Newspaper.

THE COURT: Can you speak –

JUROR CAROLYN WRIGHT: T.V. Newspaper.

THE COURT: And can you recall anything you might have specifically read about the case or anything?

JUROR CAROLYN WRIGHT: About the murders that was taken place at Tardy Furniture company in Winona.

THE COURT: And is there anything about what you have seen, heard or read that would have caused you to foci any opinions as to the guilt or the innocence of Mr. Flowers?

JUROR CAROLYN WRIGHT: No, sir.

THE COURT: And would you lay aside anything that you did hear, read or see and base your

decision only on the evidence that is presented here in open court?

JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: And the next issue, Miss Wright, is if the jury after the first – what happens in this type [1163] case is there is two phases of a trial, possibly two.

First, you decide the guilt or innocence of Mr. Flowers. If he is found not guilty, we do not go into a second phase. But if he were to be found guilty, then we would go to a second phase and that would decide the appropriate punishment that the jury felt he should receive.

The State of Mississippi will be seeking the death penalty. They will be putting on aggravating facts that would show the jury why they think he should receive the death penalty. The defense would put on mitigation witnesses. That would be witnesses to show why or proof that would show why they think he should not receive the death penalty.

The jury then would make that determination. If the jury did not return a penalty – death penalty, then the sentence would be life without parole. So I want to know, first of all, could you consider the death penalty as a sentencing option if you were deliberating at the second phase of the trial?

JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: And so you could consider that.

JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: That does not mean you are committing to do it. It is just something that you would leave open the possibility of that sentence.

JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: Would you also consider the life without parole?

[1164] JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: And so when you were deliberating on the sentence, you would consider the fact that he would get life without parole if he didn't get the death penalty.

JUROR CAROLYN WRIGHT: Yes, sir.

THE COURT: So you would leave both sentencing options open and available; is that correct?

JUROR CAROLYN WRIGHT: Yes, sir. Yes, sir.

THE COURT: Okay. Thank you.

MR. EVANS: Are you through, Your Honor?

THE COURT: I am.

MR. EVANS: Miss Wright, I know we have gone over some of this before, but are you telling us the

fact that you worked with his father at Wal-Mart, you're cousins with the witness Weems and that you knew that long line of witnesses that I read out earlier.

JUROR CAROLYN WRIGHT: Yes, sir.

MR. EVANS: None of that would affect your decision at all.

JUROR CAROLYN WRIGHT: No, sir. No, sir.

MR. EVANS: Okay. And as far as the death penalty, are you telling us that if the law authorized it and the facts justified it you, yourself, could vote for the death penalty?

JUROR CAROLYN WRIGHT: Yes, sir, I would.

MR. EVANS: Nothing further, Your Honor.

MR. CARTER: Miss Wright, I simply want to know if you know what these terms mean, aggravation and [1165] mitigation. Do you have any confusion about those?

JUROR CAROLYN WRIGHT: No, sir.

MR. CARTER: Okay. So you are saying that any evidence we put on about Mr. Flowers' background, his character, the nature of the crime, you would consider all of that in making your decision. You wouldn't have any problem with rejecting that or deeming his history before this crime to be insignificant or it doesn't matter.

JUROR CAROLYN WRIGHT: No, sir, I wouldn't.

MR. CARTER: You would consider everything.

JUROR CAROLYN WRIGHT: Yes, sir.

MR. CARTER: Thank you.

THE COURT: Miss Wright, you may step down. And there may be the temptation of some of your other jurors to say oh, what did they ask you or something. Don't talk about what you have discussed in here when you go back out with your fellow jurors, please.

JUROR CAROLYN WRIGHT: Okay. Okay.

THE COURT: If you will get Number 17.

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1165] (JUROR NUMBER 17, PAMELA CHESTEEN, ENTERED THE COURTROOM.)

And Miss Chesteen, if you will, come forward and have a seat down here.

(THE JUROR WAS SEATED ON THE WITNESS STAND.)

We are asking a couple of questions of each juror individually now, and I want to know – and I take it from you saying you've lived here for a while, worked

at Bank of Winona, you have probably heard about this case.

[1166] JUROR PAMELA CHESTEEN: Oh, yes, sir.

THE COURT: And can you tell us how you might have heard about the case, like through newspaper, radio, television, just talk in town?

JUROR PAMELA CHESTEEN: Well, yeah, I mean I remember the day it happened. I was working at the bank, and I just – I guess somebody probably called us and told us. I have seen it in the paper and on the radio. Heard people talking about it.

THE COURT: So probably about every way a person could communicate with another, you probably at some point heard, you know, through, t.v., radio or newspaper.

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: How about internet?

JUROR PAMELA CHESTEEN: I have.

THE COURT: And has anything that you read caused you to form any opinions about the guilt or innocence of Mr. Flowers?

JUROR PAMELA CHESTEEN: No. Well, let me think. I have just read or heard the things that – you know, the things that they said they had for evidence or some of them.

THE COURT: Well, do you understand just because – and I'm not meaning to be disrespectful of anybody that is in the media here today. But sometimes what you read or hear might not be right.

JUROR PAMELA CHESTEEN: I do understand.

THE COURT: And I think the media tries to do a [1167] good job, but sometimes they don't get things exactly right. And so if you read something in the newspaper at some point in the past, but that proof did not come forward during the trial, would you be thinking of things you read or heard in the past, or would you base your decision only on the evidence that is presented in court?

JUROR PAMELA CHESTEEN: Honestly, I probably would not remember what I had read, just to be totally honest.

THE COURT: Well, so are you saying then that you could and would lay aside anything that you might have read and base your decision only on – or heard and base your decision only on the evidence presented here and on nothing else?

JUROR PAMELA CHESTEEN: Yes. Yes.

THE COURT: The next question, the way a capital murder trial works is first a jury decides guilt or innocence. If the jury found Mr. Flowers not guilty, we would not even get to the second phase of a trial. But if the jury found him guilty, then we would get to a second phase, which is called a sentencing phase. At

that time the jury would decide whether the death penalty should be imposed. During that sentencing phase, the State of Mississippi would put on proof that they think would justify the imposition of the death penalty. That would be called aggravating circumstances. Mr. Flowers would put on proof of why he believes the death penalty would not be appropriate. That is called mitigating circumstances.

[1168] And at the conclusion of that proof the jury would decide whether the death penalty should be imposed. If the jury felt that the death penalty should not be imposed, then he would receive an automatic sentence of life in prison without parole.

So I want to know first, could you consider the death penalty as a sentencing option if – in the case?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: And if the facts justified it and the law allowed it, could you impose the death penalty?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: And if you felt that the facts did not justify the death penalty, could you consider life in prison without parole as an option?

JUROR PAMELA CHESTEEN: If there was not evidence to prove –

THE COURT: If you felt like the facts did not justify the death penalty, could you then consider life in prison without parole?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: So you would leave both sentencing options open and would make your decision based on the evidence as presented; is that correct?

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: And again, do you understand we would not even get to the sentencing phase unless he was found guilty in the first phase?

JUROR PAMELA CHESTEEN: Right.

THE COURT: Okay. Thank you.

[1169] MR. EVANS: I just want to go into one area that I don't think the judge went as far as I would like to cover. Excuse me.

You understand that in the first phase, the jury should not even consider which sentence would be appropriate, that you would only get to that once we got to the second phase.

JUROR PAMELA CHESTEEN: Right. Yes, sir.

MR. EVANS: Excuse me.

That's all, Your Honor.

MRS. STEINER: Miss Chesteen, good afternoon.

I have to say you hesitated just a moment when His Honor was asking you about whether or not all this

information you had received, including being here the day it happened and hearing about it, like as it was going – right after it happened, you hesitated, I thought, a little bit when the judge asked you about an opinion and whether you had an opinion.

JUROR PAMELA CHESTEEN: Well, I think it's like you all said earlier. We have – a lot us have formed an opinion.

MRS. STEINER: All right. And are you one of those people?

JUROR PAMELA CHESTEEN: Yes. At once I did.

MRS. STEINER: All right. And I think you have been very forthright. You have answered a lot of questions when the other people were in the room also. And you, you were saying things, I think, I want to be fair. I hope I can be fair. Has – you know, now you [1170] are here in private. You have had some chance to think. Have – do you think you can completely set aside that opinion, or would that opinion walk into the jury room with you no matter how hard you tried?

JUROR PAMELA CHESTEEN: No. I would have to be totally honest with – whatever I heard I would have to do, go by that or I wouldn't be able to live with myself.

MRS. STEINER: I understand that.

THE COURT: You talking about heard in the courtroom?

JUROR PAMELA CHESTEEN: Right.

MRS. STEINER: Now, on – I believe you said you were actually friends with Miss Ballard.

JUROR PAMELA CHESTEEN: In high school we were.

MRS. STEINER: In high school. And have you had any contact with her since her mother died in 1996?

JUROR PAMELA CHESTEEN: Only running into her at a restaurant or something at the school.

MRS. STEINER: All right. And have you ever discussed this case with her, what happened to her mother?

JUROR PAMELA CHESTEEN: Never discussed the case. I possibly may have seen her at some point and told her I was sorry about her mother, but that would be the extent of it. We have not ever discussed it.

MRS. STEINER: And I guess, you know, just because you have an opinion, you think you can set it aside. Let me turn to, if you, the next time she walks into your bank, if you have found honestly that the [1171] evidence does not support the entry of a guilty verdict, is that going to be a problem for you?

JUROR PAMELA CHESTEEN: Huh-huh.

MRS. STEINER: All right. You could face her.

JUROR PAMELA CHESTEEN: Yeah, I could face her.

MRS. STEINER: And now you – the judge used words aggravation and mitigation. Aggravation being what the State proves that it thinks justify the death penalty, beyond find Mr. Flowers guilty beyond a reasonable doubt. What do you understand mitigation to be from what the judge told you?

MR. EVANS: Your Honor, I don't think that is appropriate. The Court will instruct the jury what mitigation is.

THE COURT: I agree. And I did tell her already what mitigation was. That is the reason the jury might find the death penalty not appropriate. So you are again getting into issues I have already covered. So if you will move on to things I have not covered.

MRS. STEINER: All right.

Do you understand that the aggravation, aggravating circumstances, the State has to prove those beyond a reasonable doubt and you, as a juror, have to vote with all 12 of your other colleagues beyond a reasonable doubt to find those aggravating circumstances?

JUROR PAMELA CHESTEEN: Yes, ma'am.

MRS. STEINER: His Honor is going to instruct you that for mitigation, you do not have to agree

with everybody about any particular kind of mitigation or [1172] whether it exists or how much it weighs. You understand that.

JUROR PAMELA CHESTEEN: Um-hum.

MRS. STEINER: And you said you, you can close yourself off from your opinion. Can you stand and just make decisions on mitigation even if all 11 other people disagree with you on a point and you think it is mitigating? Can you do that?

JUROR PAMELA CHESTEEN: I will surely try. I mean I, I will just know what I hear.

MRS. STEINER: Well, you said the evidence. Does, does Mr. Flowers have the burden, in your mind, to prove he is not – he shouldn't get the death penalty beyond a reasonable doubt?

JUROR PAMELA CHESTEEN: No.

MRS. STEINER: All right. You could be open to anything, anything that he chose to put on about why he –

MR. EVANS: Your Honor, I think she is asking a question that this juror can't answer, because she doesn't know what the Court is going to allow at this point.

THE COURT: I, I think I covered everything when I was questioning her, when I asked her would she consider the aggravating and mitigating circumstances and would she consider both sentencing options.

MRS. STEINER: Your Honor, I'm trying to make sure she understands what mitigation is and that she can fully – that she is not mistaken about what has to be [1173] proven about mitigation in light of her statement.

THE COURT: Well, I asked her if the facts justified it and the law allowed it. And the law will be explained to her in jury instructions, if she were to be selected.

MRS. STEINER: Miss Chesteen, having heard that from the judge, can you give fair consideration to any piece of – as fair consideration to any piece of evidence the defense puts on in mitigation of the case, as you can to any piece of evidence the State puts on in aggravation?

JUROR PAMELA CHESTEEN: As long as I can see that any of it is the truth or could possibly be true. Yes.

MRS. STEINER: And that's at sentencing. If it's at the – you say if anything could possibly be true. If in the guilt phase – you say you read a lot about it and heard a lot about it and know a lot about it. Are you going to hold the State to the burden of beyond a reasonable doubt, or are you going to hold them to the could possibly be true standard?

JUROR PAMELA CHESTEEN: It's beyond a reasonable doubt; r ght? Is that – that is what it is supposed to be.

MRS. STEINER: I think His Honor and the State have both told you at the guilt phase –

JUROR PAMELA CHESTEEN: Um-hum.

MRS. STEINER: – it is beyond a reasonable doubt.

[1174] JUROR PAMELA CHESTEEN: (NODDED.)

MRS. STEINER: But what role does could possibly be true have there in your mind, especially in light of all the information you have heard from outside that you are going to try to leave outside this door?

JUROR PAMELA CHESTEEN: I'm not sure I understand what you want me to answer.

MRS. STEINER: You said you would listen to any evidence that you thought could possibly be true.

JUROR PAMELA CHESTEEN: No, I will listen to all of it.

MRS. STEINER: All right. But you would act on any evidence you thought could possibly be true.

JUROR PAMELA CHESTEEN: As long as it seemed to be the truth, yeah.

MRS. STEINER: That would be at both phases.

MR. EVANS: Your Honor, we are talking – I want to make sure the record is clear. She has asked

her about aggravators and mitigatory, and she said she could consider either one of them as long as she believed they were true. And I think that is appropriate.

MRS. STEINER: If the Court please, I didn't want to confuse the juror. I was now moving back to the guilt phase and beyond a reasonable doubt and exploring whether she had understood the Court's question.

I have nothing further from her at this point.

THE COURT: Well, let me just clear things up.

Miss Chesteen, in the guilt phase, you would listen to the evidence, and you decide the facts of the case. [1175] If there was a dispute among the evidence as to what the true facts are, you determine those facts based on your view of the evidence.

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: Do you understand that?

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: And you also base your decision as to guilt or innocence on your view of the evidence. But you could only return a verdict of guilty if the State proved Mr. Flowers beyond a reasonable doubt to be guilty. Do you understand that?

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: If the State does not meet that burden of proof, would you find Mr. Flowers not guilty?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: And then again, on the sentencing phase, during the sentencing phase if you felt like the facts did not justify or the law did not allow imposition of the death penalty, would you agree with life without parole?

JUROR PAMELA CHESTEEN: Yes.

THE COURT: And if he – if you felt the facts did justify it and the law did allow it, could you bring in a death penalty sentence if you felt that appropriate?

JUROR PAMELA CHESTEEN: Yes, sir.

THE COURT: Thank you.

If you please would, don't discuss any of your testimony in here with anybody outside.

JUROR PAMELA CHESTEEN: Okay.

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1201] (JUROR NUMBER 29, HAROLD WALLER, ENTERED THE COURTROOM.)

If you will, come down here, Mr. Waller, and have a [1202] seat.

(THE JUROR WAS SEATED ON THE WITNESS STAND.)

MR. EVANS: Your Honor, may we have one minute? I'm sorry, Your Honor.

THE COURT: Mr. Waller, we are bringing everybody in and asking them a couple of questions outside the presence of the other jurors. And one of the questions I want to ask is if you have heard anything about this case or have obtained any knowledge about the case or the investigation of the case or anything like read it in the newspaper, seeing it on t.v., read it on the internet or radio or any – hearing it on the radio or any facts about the case.

JUROR HAROLD WALLER: I just read what is in the local paper, you know, radio. I haven't talked about it.

THE COURT: Sir.

JUROR HAROLD WALLER: I haven't discussed it, the case with anybody.

THE COURT: And has anybody tried to discuss it with you at any point?

JUROR HAROLD WALLER: No, sir.

THE COURT: And has anything that you saw or read or heard caused you to form an opinion as to the guilt or innocence of Mr. Flowers?

JUROR HAROLD WALLER: No, sir.

THE COURT: And would you lay aside anything that you heard outside the courtroom and base your decision strictly on the evidence that is presented here [1203] in court?

JUROR HAROLD WALLER: Yes, sir.

THE COURT: And the next question revolves around the sentencing phase of the case, if the trial got to that point. What happens first is, is the determination of guilt or innocence. If Mr. Flowers was found not guilty, there will not be a second phase. But if he were to be found guilty, then we would get into the sentencing phase. Are you with me so far?

JUROR HAROLD WALLER: Yes, sir.

THE COURT: If we got to the sentencing phase, the jury would decide then whether he should receive the death penalty. If the jury found he did not deserve the death penalty, life in prison would be the sentence that would be imposed.

The State of Mississippi will be putting on aggravating factors which in the State's view would justify the imposition of the death penalty. Mr. Flowers, if it got to the second phase, would be putting on proof that in his view would mitigate, would be reasons why he should not receive the death penalty. And so if it got to the second phase, could you consider the death penalty as a sentencing option?

JUROR HAROLD WALLER: Yes, sir.

THE COURT: And could you also consider life without parole as a sentencing option?

JUROR HAROLD WALLER: Yes, sir.

THE COURT: So as we sit here today, you would consider both options and would make your determination [1204] based on the evidence presented at

the second phase and based on the law instructed by the Court?

JUROR HAROLD WALLER: Yes, sir.

THE COURT: And that is understanding if it even got to that second phase.

JUROR HAROLD WALLER: Yes, sir.

MR. EVANS: No questions from the State.

MR. CARTER: I have a few, Your Honor.

Mr. Waller, could you ever consider a life sentence, life without possibility of parole as a adequate punishment for the capital murder of four people?

JUROR HAROLD WALLER: I could consider it, yes.

MR. CARTER: What do you mean by consider?

JUROR HAROLD WALLER: Well, I mean if that was one of the options that was going on in the court, I, I mean, yeah. If it was capital, I could go, you know, go with the death sentence too.

MR. CARTER: Okay. All right. So you said you would consider it. But could you vote for life without possibility of parole?

JUROR HAROLD WALLER: Yes.

MR. EVANS: Your Honor, he is asking for him to decide what he would vote. That is not the proper question.

MR. CARTER: I will strike that, Your Honor. I did over step. I will strike that.

Now, Mr. Waller, would the, the nature of the crime matter to you in your vote for life or death? Would you want to know what happened and how it happened, why it [1205] happened, that kind of stuff before voting for life or death?

JUROR HAROLD WALLER: Yes, sir. I mean I would have to see the evidence that was put forth.

MR. CARTER: Would you want to – would the background, the character, the life history of the defendant before they got charged with the capital murder, would that matter to you? Would you want to know that?

MR. EVANS: Again, Your Honor, he is asking him now to say what would matter. He can't –

THE COURT: I sustain. The appropriate question is to say would you consider the aggravating and mitigating factors and base your decision on what is presented. And I have already asked that of him.

MR. CARTER: Well, Your Honor, I accept that. Your Honor, I just wanted to make sure he knew what mitigation was.

THE COURT: I explained that to him.

MR. CARTER: Okay.

THE COURT: You may step down now.

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

EXHIBIT _____

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Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1291] (JUROR NO. 44, TASHIA CUNNINGHAM, ENTERS THE COURTROOM)

**BY THE COURT:**

**Q** Ms. Cunningham, if you'll come forward, please, and have a seat down here.

Ms. Cunningham, what we're doing is were asking questions of everybody privately and individually on a couple of issues.

First, on the issue of whether you have any knowledge about this case or have heard anything about this case?

A No.

[1292] Q And did you ever even hear about the Tardy murders at all?

A I heard about it.

Q So how did you come to hear about it?

A On the news.

Q Was that T.V. or radio?

A Uh-huh,

Q T.V.?

A With a neighbor, yes, sir.

Q And have you read any papers or really kept up with the case?

A No, sir.

Q And has anything that you read or heard caused you to form an opinion as to the guilt or innocence of Mr. Flowers?

A No, sir.

Q Would you lay aside anything that you may have heard outside the courtroom and base your decision, if you're to serve as a juror on this case, only on the evidence presented here in court?

**A** Yes, sir.

**Q** And you would not let anything you've heard come into play as far as your jury deliberation?

**A** No, sir.

**BY MS. STEINER:** Your Honor, I would interpose the leading objection to the question.

**BY THE COURT:**

[1293] **Q** Okay. Would you let anything that came in outside the courtroom come into play?

**A** No, sir.

**Q** Also, the next issue involves the possibility of the imposition of a sentence. If it got to the point where we did have a sentencing – first, it would get to the point where Mr. Flowers would have had to be found guilty. If he's found innocent on the guilt phase, we do not even get to the second phase. But if it got to that phase, then the State of Mississippi would be seeking the death penalty. They would be putting on aggravating factors, which would show why they think the death penalty is appropriate.

Mr. Flowers would be putting on mitigating facts, which will show why he believes the death penalty would not be appropriate. You would then be instructed on the law and so what – would you or would you not be able to consider the death penalty? I mean, what's your view on even considering the death penalty?

**A** I would not.

**BY THE COURT REPORTER:** I'm sorry. What?

**A** I would not.

**BY THE COURT:**

**Q** Are – are you saying you would not consider it?

**A** No, sir.

**Q** Even if the law allowed it and the facts [1294] justified it, you just could not even consider it?

**A** No, sir.

**Q** Also, there's – you know, if he didn't get the death penalty, it would be a situation where life without parole would be the sentence. Would that be something that you could consider?

**A** Yes, sir.

**Q** So – but again, just tell me again what your feelings are on the death penalty.

**A** I don't believe in the death penalty.

**Q** And would there be a possible – could you consider it?

**A** I don't think so.

**Q** You don't think so?

**A** I don't think so.

**Q** But there's – in our own mind, you might could – are you saying you could possibly?

**A** I don't think so.

**Q** See, I'm not asking you to make a – you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility – that as a sentencing possibility, because you and your fellow jurors will decide the sentence, but I just want to know if you could even consider that as a possible sentence?

**A** I might. I might. I don't know. I might.

**Q** So you might be able to consider that?

**A** (Nodding head).

[1295] **BY THE COURT:** Okay.

**BY MR. EVANS:**

**Q** Good morning, Ms. Cunningham.

**A** Good morning.

**Q** Ms. Cunningham, do you also go by the name of Small?

**A** That's my married name.

**Q** You need to speak –

**A** That's my married name.

**Q** Your married name?

**A** Uh-huh.

**Q** All right. As far as the death penalty – and I want to make sure that I understand what you're saying – if the law authorized the death penalty in this case and you found that the facts of the case that came from the stand justified it, could you, in fact, vote for the death penalty?

**A** I don't think so.

**BY MS. STEINER:** I object. I think the question is whether she could consider it –

**BY MR. EVANS:** No, sir. That is the exact question, I think, that has been approved by the Supreme Court.

**BY THE COURT:** And what was the question again?

**BY MR. EVANS:** The question is: If the law authorized it and the facts justified it, could she vote for the death penalty?

**BY MS. STEINER:** I object. I believe it's [1296] could she consider –

**BY THE COURT:** I think it should be could she consider voting for it. I don't think she should be asked to be committing to it so I'll let you rephrase.

**BY MR. EVANS:** Yes, sir. I would like to get a case for that, but I'll continue with this witness at this time, Your Honor.

**BY MR. EVANS:**

**Q** Could you consider the death penalty yourself if the facts justified it and the law allowed it?

**A** I don't think so.

**Q** You don't think so?

**A** That I could.

**Q** All right. I want to go back to something we talked about the other day. You work at ADP; is that right?

**A** Yes.

**Q** And you work with the Defendant's sister, Sherita Baskin?

**A** Yes.

**Q** Now, the other day, I think you said that you do not work close to her?

**A** No, I do not.

**Q** Would you think about that for a minute?

**A** I do not.

**Q** Are you sure that you do not work side by side with her?

[1297] **A** No, I do not.

**Q** And you're saying that under oath?

**A** Yes, sir.

**Q** You've also said that you know – in addition to Sherita, you know Nelson Forrest and Reverend Lewis; is that correct?

**A** Yes.

**Q** And you're saying that knowing none of those would affect you in any way in this case?

**A** No, sir.

**BY MR. EVANS:** Nothing further, Your Honor. Wait a minute, Your Honor. That's all we have, Your Honor.

**BY MR. CARTER:**

**Q** Ms. Cunningham, let me just briefly make sure you're not confused about something and that the record is clear on this.

Now, you realize that whatever decision you make is your decision, not anybody else's decision. If you get picked on the jury, you're going to be on there with several other people. However, whatever your verdict is – and your personal verdict, based on your own moral conscience and not anybody else's and nobody can tell you how to vote. Do you understand that?

**A** Yes.

**Q** And so the question is: Could you listen to the evidence and consider it – it says consider – we're not talking about – can't nobody [1298] tell you how to vote. Do you understand that?

**A** Yes.

**Q** And do you also understand that our state legislature have deemed life without possibility of parole and the death penalty as appropriate sentences for a person convicted of capital murder. Do you understand that?

**A** Yes.

**Q** Either one. And that what you're required to do is just consider both, then decide which way you want to vote. Do you understand now?

**A** Yes, sir.

**Q** And that's your decision. And with that being the case, can you consider both options, then vote your conscience?

**A** Yes.

**BY MR. CARTER:** Thank you.

**BY THE COURT:** You may step down, Ms. Cunningham. And when you go back, don't sit out there and talk – you can't go back out among your jurors and talk about what you testified to in here.

**BY JUROR:** Okay.

**BY THE COURT:** And if you'll step back out, and then we'll call the next one in.

(JUROR LEAVES THE COURTROOM)

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

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First, I want to know if you have heard anything about this case or had any knowledge of the case or know any facts of the case.

**A** Not – just a few rumors and stuff. Right after it happened, I moved to Eely, Nevada. And after I come back, I have heard a few things, not very much.

**Q** And so you moved to Eely, Nevada?

**A** Yes.

**Q** And how long were you in Nevada?

**A** Four years.

**Q** And by that time, I guess most of the talk had disappeared if there –

**BY MS. STEINER:** I'm going to object to leading, Your Honor.

**BY THE COURT:**

**Q** And Ms. Burnside, have you heard any facts about this case that would cause you to form an opinion as to guilt or innocence of –

**A** No, sir.

**Q** – Mr. Flowers?

**A** No, sir.

[1300] **Q** Would you be able to lay aside any facts you might have heard and base your decision on the evidence presented here in court?

**A** Yes, sir.

**Q** And would you do that?

**A** Yes, sir, I would.

**Q** Also, the State – well, let me back up. The way the case works is on a capital murder case is it can possibly be a two-phase trial. First phase would be the guilt or innocence. If Mr. Flowers is found not guilty, it concludes. There's not a second phase at all.

But if he were to be found guilty, then the jury would be deciding what the appropriate penalty should be. The State of Mississippi would be seeking the death penalty. They would put on aggravating facts which would show in their mind why the death penalty should be – would be appropriate.

And Mr. Flowers will be putting on what's called mitigating factors. That would be things that, in his view, would be reasons why the death penalty would not be an appropriate penalty.

And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?

**A** That I don't think I could do. I don't know if I could do that.

**BY MR. CARTER:** I can't hear, Your Honor.

[1301] **BY THE COURT:** Can you speak up because –

**A** I don't – I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

**BY THE COURT:**

**Q** And can you explain further your views on that?

**A** I just never been put in a predicament. I've always just don't know if I could do that. It's just the best way I can explain it. I just don't think I could do that.

**Q** Again, let me explain. You're not committing to do it or not do it. You're just – we just need to know if that's something that would be in your mind where you could think about it and you could consider the possibility of it.

**A** I could think about it and consider it. That's all I could say.

**Q** And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?

**A** If I was on there, yeah, I guess I'd have to.

**Q** So if the facts justified it and the law allowed it, you would consider it?

**A** Yes.

**Q** Also, if he did not receive the death sentence – if he was convicted and the jury did not impose the death sentence, he could be facing the [1302] possi –

and would receive the sentence of life without parole. So is that a sentencing option that you could consider, also?

**A** Yes. I could consider that.

**Q** And so you would consider and have an open mind as to both sentencing options then; is that correct?

**A** Yes, sir.

**BY THE COURT:** Okay. Mr. Evans.

**BY MR. EVANS:**

**Q** Good morning, Ms. Burnside.

**A** Good morning.

**Q** If you were a juror on this case, in the sentencing phase, would you just automatically vote for life sentence?

**BY MR. CARTER:** Your Honor, I object. She's already said that she could consider both.

**BY THE COURT:** I'll sustain the objection.

**BY MR. EVANS:** Your Honor, are you saying I can't ask her if she would automatically vote for a life sentence?

**BY THE COURT:** Well, I'll reverse my ruling. I think that is appropriate.

**BY MR. EVANS:**

**Q** If you were picked as a juror – let me explain what I'm asking. Because of your beliefs on the death penalty, would that force you, if you had to make a decision of life or death, to just [1303] automatically vote for life?

**A** I'm not sure if I'm understanding what you're asking me –

**Q** All right. I want to make sure you understand.

**A** – can you explain it?

**Q** If you're picked as a juror in the case, the first phase of the trial deals with guilt or innocence. If this defendant is found guilty, we go into the second phase where the jury will be asked to give the death penalty by the State.

**BY MR. CARTER:** Your Honor, I object to him going back over the same question. The Court has already asked –

**BY MR. EVANS:** Your Honor, she said she did not understand it. I'm trying to explain it to her.

**BY THE COURT:** I think he can explain his question, because she did say she did not understand.

**BY MR. EVANS:**

**Q** And in that phase, the State will be asking for the death penalty and the defense will be asking for a

life sentence. My question is simply this: Because of your beliefs that you have some problems with the death penalty, would those beliefs cause you to just automatically vote for a life sentence instead of the death penalty?

**A** No. I can keep an open mind about it –

[1304] **Q** Okay.

**A** – but that's all I can say. I just – (shaking head).

**Q** And when were you sued by Tardy Furniture?

**A** I don't remember. Let me explain that. I worked for Ms. Bertha. She hired me to work for Mr. Tardy before she was married to him the first time. I was caring for Ms. Lena Tardy. That's how I met Ms. Bertha. So when me and my husband was going through a divorce, she let me have some furniture. And she said that she was going to note it on the book. Sometimes, I cleaned up for her and I paid for it and we just have, like, a little understanding about it. Okay. When she got killed, it was still on the book. And then her son-in-law – when I came back from Nevada, then that's when I had to pay for it. I don't remember when it was.

**Q** So there was a dispute between you and her son-in-law?

**A** No. It wasn't a dispute. He just –

**Q** Well, did you agree that you owed it?

**A** Yes. We had no falling out about it. I had the funds, and I agreed I owed it. When I went to Nevada, I guess it was just a space where I owed him. When I came back here and went to work, I paid him for it. We never had no misunderstanding about it.

**Q** If it wasn't no misunderstanding, why did [1305] it have to go to court?

**A** I'm not quite sure about that. I remember them bringing the papers after I come back here to go to work. Maybe he found out I was back or what. But then I went down to the store – that's when they had moved the store over to where the other building was – and I talked to him about when I paid it. We never had a falling-out about it.

**Q** But you did have to be sued over it?

**A** Yes. I can't remember the –

**Q** And there was a judgment against you?

**A** Yes. But it was no falling-out about it.

**Q** Is there anything about that, that would cause you any difficulty in this case?

**A** No. Because he is a distributor for something for one of our salesman at Super Value where I work, and he come in every Thursday, and the lady make a order so I see him like on a weekly basis. But, you know, sometimes, I speak if it's – because she see him like over in her office, so no, it's nothing about that would make me have no –

**Q** When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

**A** Well, because I – you know, I prefer not to judge anyone. But then when they come back and say could I be fair. My thing is I prefer not to judge anyone. But now, I will be fair.

[1306] **Q** All right. Who will you be fair to?

**A** I will be fair to whoever evidence is presented. I will be fair. Because I would want somebody to be fair to me or my children or my family. That's the only way I can explain it.

**Q** So now you are –

**BY MR. CARTER:** I object. She's answered that question. He's badgering this witness.

**BY MR. EVANS:** Your Honor, I don't believe this witness is badgered.

**BY THE COURT:** I think I'll overrule. He hasn't even asked a question.

**BY MR. EVANS:**

**Q** So you have changed your mind, and you say now that you could judge someone; is that correct?

**A** Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

**Q** So you still have a problem with judging someone?

**A** I still have a problem with that.

**Q** Would that problem be such that you would think about it if you were picked on a jury?

**A** Well, I'd have to say yes.

**Q** It would? So that might affect your judgment in the case; is that right?

**A** It could, possibly, yes, sir.

**Q** And I – I'm not trying to get personal but these are things we need to know. Your son was [1307] convicted of robbery; is that right?

**A** Yes.

**BY MR. CARTER:** Same objection, Your Honor.

**BY MR. EVANS:**

**Q** And since this case –

**BY THE COURT:** Overruled.

**BY MR. EVANS:**

**Q** Since this case is a murder during the commission of a robbery, do you think that you might think of your son when you were being asked to decide this case?

**A** I thought about it. And it wouldn't have no affect on it, because my son – he told me that he did do it, and I had no problem with it.

**Q** So that issue wouldn't affect you?

**A** No.

**BY MR. EVANS:** Thank you, ma'am.

**BY THE COURT:** Mr. Carter.

**BY MR. CARTER:**

**Q** Ms. Burnside, if you got picked on the jury, you would be fair to both sides, wouldn't you?

**A** Yes, sir.

**Q** And despite the fact that you don't like to judge, if you got picked you would, in fact, judge and be fair to both sides; is that correct?

**A** Yes, sir, that is correct.

**BY MR. CARTER:** Thank you.

**BY THE COURT:** Ms. Burnside, you may step [1308] down. Ana ask you when you return out there, do not talk about, out there with your fellow jurors, what's been discussed in here.

**BY JUROR:** Yes, sir.

**BY THE COURT:** And it may be a while longer before you have to wait around, and just please be patient. We're moving as fast as we can.

**BY JUROR:** Yes, sir.

(JUROR LEAVES THE COURTROOM)

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

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TRIAL COURT #: 2003-0071-CR

* * *

[1327] **BY MR. EVANS:** Your Honor, before we do that, I have a person here that I would like to put on the stand in response to some questions that I asked one of the jurors, to make a record, if I may. It's a Ms. Crystal Carpenter.

**BY THE COURT:** You may. Well, where is she?

**BY MR. HOPPER:** I'll get her.

**BY THE COURT:** Is this Ms. Carpenter?

**BY MR. EVANS:** Yes, sir. And she may need to be sworn.

(WITNESS IS SWORN BY THE COURT)

**BY MR. EVANS:** If you would, come around and have a seat up here, Ms. Carpenter.

**BY MR. CARTER:** What's her name, again? Crystal Carpenter?

**BY THE COURT:** Correct. I mean, I'll have her state her name for the record. State your name for the record, please.

**BY THE WITNESS:** Crystal Carpenter.

**DIRECT EXAMINATION**

**BY MR. EVANS:**

**Q** Ms. Carpenter, where do you work?

[1328] **A** Advanced Distributor Products in Grenada.

**Q** And is that known as ADP?

**A** It is.

**Q** How long have you worked there?

**A** Almost 18 years.

**Q** And what is your job title there?

**A** Quality control clerk.

**Q** You work in the office?

**A** I do.

**Q** Did somebody from my office contact you in relationship to where two individuals worked at ADP?

**A** They did. John Johnson did this morning.

**Q** All right. Do you know a person by the name of Tashia Renee Small Cunningham?

**A** I do.

**Q** Where does she work?

**A** On the Raw 2 line.

**Q** The Raw 2 line?

**A** Uh-huh.

**Q** Do you know a person by the name of Sherita Baskin?

**A** I do.

**Q** Where does she work?

**A** On the Raw 2 line.

**Q** How close in relationship to each other is their work stations?

**A** Probably about nine or 10 inches.

**Q** Nine or 10 inches?

**A** Uh-huh.

[1329] **Q** So they work side by side?

A They do. Like I said, some days, you know, if somebody's not there, they might have to move up and down. But that's their regular jobs.

Q And do they have to converse with each other each day during – because of their work?

A Yes, sir, they do.

Q And explain that if you would, briefly.

A Well, I mean, we all have to communicate together up there. But, I mean, with them working side by side, you know, if there's a problem, like, with a label or something like that, they have to communicate with one another.

**BY MR. EVANS:** Nothing further, Your Honor.

**BY THE COURT:** Anything?

**BY MR. CARTER:** Yes, sir.

**CROSS EXAMINATION**

**BY MR. CARTER:**

Q How long have they been working side by side?

A Oh, however long they've been there. I'm sure most of them's been there probably about at least seven or eight years at the most or maybe a little bit more.

Q And do they always work on the same project or task, each one of them? I don't know how the job

operates, but I'm assuming – it's an assembly line. Is that what you're saying?

[1330] **A** It is.

**Q** Is there some product coming down the line?

**A** It is the same product every day.

**Q** Each has to do something to it?

**A** Right.

**Q** And you've observed them – personally observed them on a daily basis?

**A** I do. Like I said, unless, like somebody might be out and, you know, they might have to move another one down the line or something, but that's where their regular jobs are. Because I have to go by there every day.

**Q** Are there records kept as to the particular location of every person?

**A** It is.

**Q** On every day?

**A** It is.

**Q** Do you have those with you?

**A** No. It will be found in human resource.

**Q** Can you provide them? Can you get them and provide them to substantiate your testimony?

**A** I can.

**Q** And would you do that for us?

**A** I will.

**Q** Okay. And when could we – could that be available?

**A** I'll. have to contact human resources as soon as I walk out of here.

[1331] **Q** Okay. And so your testimony is – how many people – what did you call it – Raw 2?

**A** Raw 2 line.

**Q** Raw 2 line. How many persons are on that line?

**A** It's probably anywhere from, I'd say, 25 to 35.

**Q** Okay. And each person is assigned like a particular spot that they have to be in? Or can they be at the different place on the line?

**A** No. They are assigned to a particular spot. Like I said, if somebody is out and they're running, maybe, a smaller unit or something, then they can move the person down, you know, on the up flow or the down flow.

**Q** Okay. And you are sure that as of this Monday, or last Friday, they were, in fact, working next to each other?

**A** Right.

**Q** Okay. And the records reflect – the record will reflect that just as your personal having observed them doing that?

**A** Right.

**BY MR. CARTER:** Okay. One moment.

(PAUSE)

**BY MR. CARTER:** No further questions, Your Honor, except that we object to the district attorney's office going down to – well, I'll have to do it without the –

[1332] **BY THE COURT:** Ms. Carpenter, you may step down, and you're free to go.

(WITNESS LEAVES THE COURTROOM)

**BY MR. CARTER:** Your Honor, I just want to go on the record objecting to the district attorney's office going to people's jobs and contacting their supervisors and – during the voir dire, before voir dire is even concluded. And with the intention of trying to get information out in the street, out in the public that certain witnesses are potentially lying. And we further –

**BY THE COURT:** Juror, not witness. It's juror.

**BY MR. CARTER:** Juror. I'm sorry. Particular jurors are lying. And we further object to any ruling being made as to whether or not this juror is lying until we see some records made in the ordinary course of business to substantiate her personal testimony.

**BY MR. EVANS:** Your Honor, I had received evidence or I had received communications that this juror worked next to Ms. Baskin. I asked her in front of the whole panel if she worked next to her. She denied it, said she worked on the far end of the line. To make sure there was no misunderstanding, I clarified that on individual voir dire and [1333] asked her if she worked next to her. She flat denied it. Said that she did not. I think it's my obligation to the Court instead of me just asserting that I think she works to her – next to her to put on proof if that is, in fact, true, which I elicited to do.

This juror was not contacted. She had no knowledge that they were contacted. I did not have the place contacted for any purpose other than to ask one question, where did they work in relationship to each other. I would ask that this juror be brought back into Court and asked again if she understands the oath and if she works next to her.

**BY THE COURT:** I think this juror's already said under oath what her response is, and I don't see any need to go further on this issue at this time.

**BY MR. EVANS:** I would ask that at this point she be struck for cause.

**BY MS. STEINER:** Your Honor, two observations. One, in respect to my prior concerns expressed by the district attorney having repeatedly raised in the public view the specter of the D.A.'s office investigating and charging with perjury on the basis of there were two jurors charged in open court the last time.

I believe this is part and parcel of [1334] that same effort, and we believe it is improper for the reasons said and further cited in support of our prior motions that the State be precluded from engaging in any sort of death qualification of jurors and to strike the death penalty because the heightened scrutiny and standards applicable in the death penalty case require, for all the reasons Mr. Carter says, you know, scrupulous attention to lack of misconduct and I believe – interference with the process by the district attorney, and I believe this is – this sort of thing is in support of that prior motion as well.

**BY MR. EVANS:** Your Honor, and obviously, the Defense doesn't want the jurors to tell the truth and to find out what the truth is, but the State wants truthful answers from every juror that is here.

**BY MR. CARTER:** So do we.

**BY THE COURT:** Well, voir dire, I think, means to speak the truth. And if I've got jurors that aren't speaking the truth during voir dire, then I think it's appropriate to come forward and present proof of that. Whether now is the time to do it or whether we should have waited till conclusion of voir dire is, you know, subject to question.

But if either of you have notion that [1335] somebody has not been truthful, then I will – you know, I think you've got a responsibility as an officer of the court to come forward with that.

I don't think at this time that's grounds for cause. I think certainly, you know, the State can preempt orally. But I mean, we've got the sworn testimony of Ms. Cunningham, and we've got Ms. Carpenter's sworn testimony. And at this point – mean, I can't have collateral issues relating to all the jurors. But as I say, I think that would be grounds for a preemptory strike if the State chooses to exercise one at some point.

(To the bailiff) Bobby Lester.

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1187-1337 VOLUME 32 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

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**A** Yes, sir.

**Q** – so if you would now, just tell us what – how you came to hear about the case and [1336] things like that.

**A** I was working in Winona at the Bank of Winona when the incident occurred. Shortly – I'd say minutes after it happened, we had – people began to come into the bank, people crying, people telling us that there had been an incident down there, that Ms. Tardy had been murdered. And, of course, that's where it all began. And community talk and the local newspaper publications, just – that's basically where I've heard about it.

**Q** And have those things caused you to form an opinion as to the guilt or innocence of Mr. Flowers?

**A** We have been talking about this now for 14 years and hearing about it, and the cases have gone on and on. I suppose, you know, if I said that I did not have an opinion of some kind, I'd be being untruthful to you. But if the question is if I – am I stuck on an opinion? My opinion is just from what I've heard people say. I've never heard any – any facts, I guess.

**Q** Well, could you, if you were called as a juror, lay any opinion aside that you might have formed and base your decision only on the evidence and on nothing else but evidence presented here in this court?

**A** Yes, sir, I could.

**Q** And could you lay aside anything that you might have read in the paper, heard about, gossip in [1337] the street and anything else and base your decision just on the evidence in court?

**A** Yes, sir, I could.

**Q** If you had read something in the past or heard some gossip out in town about the case but that's not proven in court, would that come into your play or your consideration at all when deliberating?

**A** No, sir.

**Q** Also, the situation is if the State of Mississippi obtains a conviction on the first part of the case, there would be a second phase. The first phase is guilt or innocence is decided. If he's found not guilty, the case ceases. It's over. If he was found guilty, then we would go onto a second phase. It's called the sentencing phase. At that time, the jury would be called upon to make a decision as to the appropriate sentence. The appropriate sentence could be the death penalty or life without parole. The State will be putting on aggravating factors, which would show in the State's mind why the death penalty would be appropriate.

The Defense would put on mitigating factors, which would be in their minds reasons why the death penalty should not be imposed or would not be appropriate.

Could you consider – would you listen to the evidence and all the facts and the law given to you by the

Court and would you consider both of [1338] these options?

**A** Yes, sir.

**Q** And would you, before you hear anything, be leaning toward either option?

**A** No, sir.

**Q** So you're telling me that you will keep an open mind and consider both options equally prior to hearing any testimony?

**A** Yes, I would.

**BY THE COURT:** Mr. Evans?

**BY MR. EVANS:** No questions.

**BY MS. STEINER:**

**Q** Good morning, Mr. Lester.

**A** Morning.

**Q** I believe in response to His Honor's question, you said you were working at – this is Bank of Winona?

**A** Yes, ma'am.

**Q** How – how far from the Tardy Furniture Store was Bank of Winona?

**A** Couple of blocks.

**Q** All right.

**A** Two or three blocks.

**Q** All right. But within a few minutes of the incident happening there –

**A** Yes.

**Q** – people who were so personally affected by the deaths of one or more of these people, that they were in tears –

[1339] **A** Yes.

**Q** – were speaking to you personally about those –

**A** To whoever would listen to them.

**Q** Right. And you were among them?

**A** Yes.

**Q** This broke your heart, I'm sure, as it did these peoples.

**A** It shocked me.

**Q** And I believe you said you'd been friends for years with Ms. Rigby's husband. Is that correct?

**A** Yes.

**Q** So you felt his pain. I would imagine, Oh my God, I want to be there to pray with Bennie when he hears this?

**A** I don't know that I felt that exactly. But yes, I was concerned for all the families.

**Q** All right. And you have that knowledge from the minute of the pain of your friend Mr. Bennie Rigby?

**A** Uh-huh.

**Q** Are you in his church?

**A** No.

**Q** Do you participate with his singing in any of his events?

**A** No. I have sung at events that he has sung at, but I've never sung with him that I can recall.

[1340] **Q** Would that include the event in Kosciusko as a fund raiser for the reward fund in this case? Did you perform at that one?

**A** For what?

**Q** A few months – a month or two after this, there was a fund raiser which Mr. Rigby's gospel group performed, raising funds for a reward –

**A** Oh, no. No.

**Q** – fund to assist in this investigation?

**A** No.

**Q** Did you attend that?

**A** No.

**Q** You didn't perform that? Now, I believe you've said you've known the Tardy family your whole life. That would include Ms. Bertha.

**A** Yes. Knew more Roxanne. She was a year older than I was in the school.

**Q** All right. And you graduated with her from school?

**A** No. I graduated from another school, but still in town.

**Q** All right. Was that Mr. Tom Tardy? Was he at your school? I'm trying to figure out who you graduated with.

**A** I'm a year younger than Roxanne.

**Q** Okay.

**A** I've never met Mr. Tom Tardy.

**Q** Okay. And was Bank of Winona where Tardy's Furniture did its banking?

[1341] **A** Yes.

**Q** And that Sherry – Sharon Martin was the window clerk?

**A** That name –

**Q** Bailey, I'm sorry. Sherry Bailey – Sharon Bailey was the window clerk that morning.

**A** No. They must have had an account at another bank as well.

**Q** All right.

**A** Because she's never worked for us.

**Q** All right. And did you attend Ms. Rigby's funeral?

**A** No, I did not.

**Q** All right. Did you have bank employees who you gave leave to, to attend Ms. Rigby's funeral?

**A** I don't recall. I feel like probably so, yes.

**Q** Same for Ms. Tardy's funeral and Mr. Golden's funeral?

**A** Like I – I don't – I do not recall that, but it would be possible that I did, yes.

**Q** All right. And that was certainly something after your experience that day, you were not going to say, "Sorry, I need you –

**BY MR. EVANS:** Your Honor, I object. That is not proper, unless she can show there is some connection with this defendant. It's nothing improper about letting employees go [1342] to funerals.

**BY MS. STEINER:** Your Honor, I'm asking only about the funerals of the victims and his role with respect to facilitating attendance.

**BY THE COURT:** Well, I'll – ask it, but I'll ask you to get to the issues that were the purpose of individual voir dire, because – I'll let you wrap this line up, but move on to that, because we had the opportunity when we were group voir diring to ask these questions.

**BY MS. STEINER:** Your Honor, in light of the Court's admonishment that we were not to go into knowledge about the events and since mitigation and victim impact testimony are part of the events that will be considered, we felt that these were the things that the Court wished us to reserve for individual voir dire. And that is why we were pursuing them and intend to continue pursuing them –

**BY THE COURT:** I told you to wrap it up, and that he could answer this question.

**BY MS. STEINER:**

**Q** Now, Mr. Lester, you did testify that you have formed an opinion on the basis of your 14 years of hearing about this case; is that correct?

**A** Yes.

**Q** You've also testified that people – it's [1343] been dragging – we want it over with. Is that correct?

**A** I'm sorry?

**Q** Didn't you say something about the case has gone on and on. I believe you said that in response –

**A** I may have said that.

**Q** All right. So you would like it to be over with. Is that correct?

**A** I would like for it to be over with, yes.

**Q** All right. And if you serve as a juror, that desire is going to walk into the jury room with you?

**BY MR. EVANS:** Your Honor, I object. That has nothing to do with whether – I think everybody wants it to be over with. But that has nothing to do with whether this juror can be fair and impartial and base his decision on the evidence. It's irrelevant.

**BY THE COURT:** I sustain the objection. I mean, you can rephrase, if you would like, but I. . . .

**BY MS. STEINER:**

**Q** If you are deliberating on this jury, your desire to have – shared with, quote, everyone as Mr. Evans has said, to get this over with, will walk in that jury room with you; is that correct?

**A** To find justice and to – to bring an end to – to this for everyone, yes.

[1344] **Q** So if you're voting one way and 11 of your fellows are voting another way, you know that if you keep holding out on your one vote, it won't be over. Is that correct?

**A** I realize that.

**Q** On guilt? Now – and your desire to have it over with will be there when you're deciding whether to change your vote? Is that –

**A** My desire to have it over with has nothing to do with my desire to make sure that justice is done in this case.

**Q** And you have an opinion as to what justice would be in this case; is that correct?

**A** I have no idea, because I haven't heard the facts other than what I've – just hearsay on the street.

**Q** I thought you told His Honor both when we had everybody else here –

**A** Uh-huh.

**Q** – and then this morning that you had formed an opinion?

**A** I had formed an opinion, based on the hearsay I've heard on the street.

**Q** And as you walk into that jury room, before you've heard any evidence, you – that opinion is one way or the other – I'm not going to ask you what it is – and right now, you believe that justice would be done if – as far as you know, nothing changes, in the way that your opinion is [1345] now; is that correct?

**A** The judge asked me if I could lay my opinion aside and listen to facts and make what I thought was a fair decision based on the facts that I hear, and I can.

**Q** I'm not asking you that question –

**BY MR. EVANS:** Your Honor, he is answering her question.

**BY MS. STEINER:**

**Q** I am simply asking, as you sit here today, you have an opinion, is that correct, about what would be justice in this case?

**A** I can't say about what would be justice in this case. I have an opinion on – or maybe a – over time you develop your own idea of what may have happened.

**Q** And you sat in group voir dire and several people with opinions weren't here when – when you came back on Monday morning –

**A** Uh-huh.

**Q** – and when you came back on Tuesday morning –

**A** Uh-huh.

**Q** – and you, like them, share an opinion – have an opinion as you sit here now.

**A** I have an opinion.

**Q** All right. Now, His Honor began – His Honor inquired about your ability to consider the two punishments for capital murder established by [1346] the State of Mississippi.

**A** Yes, ma'am.

**Q** Now, on your jury questionnaire, you checked the box that said you strongly favored the death penalty?

**A** For crimes that merit it.

**Q** I – well, absolutely. You can't impose it for crimes that don't.

**BY MR. EVANS:** Your Honor, I object to these crazy questions. He's answered it. It did not call for any extra comments.

**BY MS. STEINER:**

**Q** His Honor will – His Honor will be and the State will ask for and we will anticipate that the jury will be instructed that one of the two sentences for – that this jury may consider the punishment of death – the death penalty and the punishment of life in prison without parole.

Now, I believe when His Honor said as you sit here, you don't favor one over the other; is that – was that your answer?

**A** Favor – I don't favor one over the other?

**Q** Yes. Do you favor the – one of those punishments, as you sit here now, over the other – let's assume the person has been – you have found –

**BY MR. EVANS:** Again, Your Honor, that is inappropriate questioning. It is not the proper question.

[1347] **BY THE COURT:** I don't think hypotheticals are appropriate during voir dire, and that's apparently what you're –

**BY MS. STEINER:** Well, allow me to rephrase.

**BY MS. STEINER:**

**Q** As His Honor said, we don't even get to considering what the punishment has been until a jury has determined unanimously, you sitting as juror, will have to determine that Curtis Flowers was guilty of at least one – and in this case, you could consider up to four separate capital murders; you understand that?

**A** Yes.

**Q** You could have – you wouldn't be considering penalty unless and until you had made that finding.

**A** Yes.

**Q** You will have made that finding, and you will have arguments from the State that any capital murders of which you have found beyond a reasonable doubt Mr. Flowers is guilty of were brutal and you have – and you will probably hear testimony in addition from people who were personally affected, your friend, among others, Bennie Rigby about his grief and the loss and his anger.

Now, at that point, you found Mr. Flowers guilty, deliberately committing what the State would characterize as four brutal murders. You may have [1348] heard your friend Bennie Rigby –

**BY MR. EVANS:** Your Honor, I object. She's trying to tell him what he is going to hear and have to rely on. He is going to have to listen to the evidence that comes out in court, listen to the Court's instructions and make his determination of what's appropriate at that time based upon that. And for her to sit up

here and try to argue to him what he's going to hear is completely inappropriate.

**BY MS. STEINER:** If the Court please –

**BY MR. CARTER:** That's an invalid objection Mr. Evans is making. And the State is trying to instruct him –

**BY THE COURT:** I think Ms. Steiner is asking the questions, and she can argue the objection. It's appropriate for her to make the argument, not you. And I'm sure she can speak for herself.

**BY MS. STEINER:** Your Honor, I agree with Mr. Carter and was opening my mouth to say I believe that is an invalid objection, as the State well knows. This is the evidence that will be faced, and we are entitled under *Morgan* to voir dire about how a juror will deal with mitigation in light of that, and these are proper questions, and –

**BY THE COURT:** I'll allow you to ask [1349] questions. And I'm not – and this is your style of questioning – and I don't mean to – I'm not admonishing you, but your questions sometimes get so long that I get confused, and I don't – and I'm not saying that to offend you, but –

**BY MS. STEINER:** So do I, Your Honor.

**BY THE COURT:** And you know, if you could maybe shorten the length of them, it might be helpful sometimes to a witness because, as I say, I get confused sometimes.

**BY MS. STEINER:** Your Honor, I have my great-great-grandfather, my great grandfather and my grandfather were all preachers, and they all wrote sermons, and their sentences were even longer. I believe I inherited it. I'm sorry. Let me step back.

**BY MS. STEINER:**

**Q** You will be in the jury room. If you are even asked to consider these two penalties, Mr. Flowers – you will have found him guilty of at least one capital murder. You understand that?

**A** (Nodding head).

**Q** You understand that you will, at the point at which you begin thinking about what – which of those two sentences is appropriate have heard – well, you will have heard aggravating factors relating to the crime that – one of which will likely be a particularly brutal and heinous crime.

[1350] **A** Yes.

**Q** You will have heard your friend, Bennie Rigby, testify probably – they intend – they put him as a witness here – probably about the grief and pain he and his children have suffered. You may even hear from some of his boys, who I think you know. Is that correct? You know who his boys – you know –

**A** I know who they are.

**Q** You raised your hand –

**A** I know who they are.

**Q** – that you were acquainted with them. At that point, after you've heard all of that, Mr. Flowers will stand up and put on matters in mitigation of sentence, asking you to consider the life sentence without parole. And they may have nothing to do with the crime. Do you understand that?

**A** Yes.

**Q** At that point, isn't it fair to say you would think the death penalty was justice in this case?

**BY MR. EVANS:** Again, I object. She's trying to put forth part of the facts that are there and get him to make a decision on what sentence he would give at this point and that is inappropriate.

**BY MS. STEINER:** I am not asking him what sentence he would give. I'm asking what [1351] would be first in his mind –

**BY MR. EVANS:** She's asking for him to pledge a verdict, which is improper.

**BY MS. STEINER:** I'm asking him whether he could – let me rephrase that.

**BY MS. STEINER:**

**Q** At that point, would your mind be open to fully consider facts about Mr. Flowers' family and his childhood there, how he was family man?

**A** Yes.

**Q** Your mind – you could consider those?

**A** I would consider that.

**Q** You would not prefer the death penalty at that point?

**A** No.

**Q** Would you prefer life – would – would – you would not be – you would have an open mind with respect to life without parole?

**A** I would have an open mind.

**Q** Could you vote for life without parole under those circumstances?

**BY MR. EVANS:** Your Honor, again, unless the Court is going to allow us to go into this line of questioning, it's improper for the Defense to go into it.

**BY MS. STEINER:** I thought you had submitted the Court a –

**BY MR. EVANS:** The Court hasn't ruled on it yet. I don't know what the ruling is.

[1352] **BY THE COURT:** Well, I think he's answered the question already.

**BY MS. STEINER:** Thank you, Mr. Lester.

**BY THE COURT:** Mr. Lester, you may step down. And when you go back out, don't talk to anybody about what you've been asked in here.

(JUROR LEAVES THE COURTROOM)

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1338-1488 VOLUME 33 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

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Curtis Giovanni Flowers v. State of Mississippi

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Kathy Gillis, Clerk

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TRIAL COURT #: 2003-0071-CR

* * *

[1359] (JUROR LEAVES THE COURTROOM. JUROR NO. 53, FLANCIE JONES, ENTERS THE COURTROOM)

**BY THE COURT:**

**Q** Ms. Jones, if you'll come forward, please. What we're doing now is asking questions of individual jurors that we felt was appropriate to ask privately instead of out in front of your fellow jurors.

And first, I want to know if you have any knowledge about this case, if you've heard about it

through the years or read anything, seen it on T.V., the radio or Internet or anything?

**A** Nothing. Nothing close because I've always worked the third shift. So for 17 years, I've worked at Heat Craft, which I quit in '07. But during this time, I worked nights. I slept days. I [1360] only got up to get my husband off to work or to interact with my children off the bus.

**Q** Right.

**A** Very little. As far as conversating with anybody about it, I didn't have time for that. Now I do – I am an avid gardener. So between that time – any time I had to work in my garden – and then a T.V. person – I'm not a T.V. person. So it's not a lot I heard. It's just that – you know how you hear people talking about it, but as far as being interested and conversating about it, I just never really conversated to anybody about it, because – it might not even sound right to you, but I'm a country girl. I live on a farm. Certain things do things to certain people, and that didn't do it to me because I'm a – I guess I can't say a loner, but I just don't think (inaudible).

**BY THE COURT REPORTER:** I'm sorry. What?

**A** I'm not a – I kind of keep to myself as far as the way I live. I live on a farm, so I do the things that people on a farm do. But as far as going from house to house and telephoning and whatever, I don't do that.

**Q** And if you did hear or the thing – I mean, you know, I don't even want you to tell us what you heard. But can you lay aside anything you might have heard about the case and listen to the evidence here in court and base your decision only on the evidence and on nothing else but the [1361] evidence?

**A** Nothing else. (Nodding head.)

**Q** The next question concerns the possibility if it got to the point where there was a sentencing phase. What happens in a capital murder case is a jury first decides the guilt or innocence of the person that's on trial. If it got to the point where the jury found that person not guilty – not guilty, it would be over. There would not be a second phase.

But if the jury found that person to be guilty, then we would get into the second phase, which is called the sentencing phase. At that time, the jury would determine what the jury believed to be the appropriate sentence in the case.

The State of Mississippi, I understand, is seeking the death penalty in this case. The possible penalties, if it got to that point, would be life in prison without parole or the death penalty.

The State of Mississippi would put on aggravating factors, which are factors that they believe would justify the imposition of the death penalty. Then Mr. Flowers, through his attorneys, would put on proof called mitigating factors which, in his view, would be reasons why the jury should not impose the death penalty. So

will you – will you consider – or can you consider both of those sentencing options?

[1362] **A** (Nodding head).

**Q** And do you – having heard nothing about the case at all and no proof on mitigating or aggravating, do you have an open mind and an equally open mind as to both possibilities at this point?

**A** I have an open mind.

**Q** And you could consider both of those as possible sentences?

**A** I could consider both.

**BY THE COURT:** Okay. Thank you.

**BY MR. EVANS:**

**Q** Good morning, Ms. Jones.

**A** Good morning.

**Q** Ms. Jones, you are related to Hazel Jones; is that right?

**A** She's my sister-in-law.

**Q** Okay. And you are related to Angela Jones?

**A** She's my niece.

**Q** Okay. And she is the defendant's sister?

**A** That's something new. I didn't know that till you told me yesterday.

**Q** Okay. Knowing now that she is his sister and knowing now that Hazel Jones is his aunt, would that affect you? Would you be thinking about that if you were picked as a juror in this case?

**A** It would not affect me because we do not have any type of relationship. We can have a family reunion. They don't show up at the family reunion.

[1363] **Q** So you could completely –

**A** I could completely.

**Q** – set that aside. I noticed yesterday you were about 30 minutes late. Why were you late?

**A** Because I'm used to working nights and getting up in the morning is a big deal. I'm used to working nights, and my body has kind of gotten – I guess you have to work nights to understand it. That's the only reason I was late, because I ended up staying awake at night.

**Q** All right. And I think you've said that you knew, in addition to Hazel Jones and Angela, you know Archie, Sr. – Archie Flowers, Sr.?

**A** No, not that I know. No. I told you yesterday that if you told me that's him, that's the only way I would know him. I don't know him.

**Q** Okay. Correct me if I'm wrong. I thought that that was what you had said. I may have written it down wrong. You stated that you knew Connie Moore?

**A** I used to work at a place where they said she was getting married. And this particular guy that worked there, she was – she was going to marry him. But as far as knowing her, no, I don't know her.

**Q** Okay. Nelson Forrest?

**A** I went to school with a lot of Forrests, so I don't know which one is which.

**Q** And Danny Joe Lott?

[1364] **A** Well, I went to church with – I think with his uncle when I was little. That's the only reason I know his name.

**Q** Okay. And I think on your questionnaire, you said you were strongly against the death penalty.

**A** I guess I'd say anything to get off.

**Q** Okay. Well, are you saying that you didn't tell the truth?

**A** No, that's not that. It's just that if didn't have to be here, I wouldn't want to be here.

**Q** Well, I want to know when you put down you were strongly against the death penalty –

**A** I was trying to not be – I – really and truly, I don't want to be here. I'll say it like that.

**Q** All right. May I finish my question?

**A** Okay.

**Q** When you put down that you strongly didn't believe in the death penalty, were you being truthful?

**A** No. Because I was sitting up in the bed that night, and I had to fill out that paper and get it back to you. And I was late the first day because I couldn't find the paper. And I know if I'd lost it, I'd never get it back to you.

**BY MR. EVANS:** Your Honor, I don't have any further questions.

**BY MR. CARTER:**

[1365] **Q** One moment, Your Honor. Ms. Jones, you testified earlier that you could be fair to both sides. Is that correct?

**A** That's correct.

**Q** And you testified that you could consider both options of punishment.

**A** Yes, I can.

**Q** And if you got picked for a jury – served as a juror, you would make every effort to get here and to be awake and to participate as full as you can?

**A** Yes. Yes.

**Q** And there's no reason, as far as transportation wise and that kind of stuff, that you couldn't be here, is there?

**A** No.

**Q** So you could be here. And you don't have any doubt that you could be fair to both sides; is that correct?

**A** I have no doubt.

**Q** And you'd consider whatever's presented from the witness stand.

**A** I could.

**Q** Thank you.

**A** I'm sorry about being late. It was unintentional.

**BY MR. CARTER:** Thank you.

**BY THE COURT:** Ms. Jones, you may step down now. And when you walk out with your [1366] fellow jurors, don't talk about with them what was talked about in here.

**BY JUROR:** Okay. All right. Thank you.

**BY THE COURT:** Yes, ma'am. Thank you.

(JUROR LEAVES THE COURTROOM)

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1338-1488 VOLUME 33 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1402] (JUROR LEAVES THE COURTROOM)

**BY THE COURT:** I need No. 62, next, Ms. Copper.

(JUROR NO. 62, DIANE OWENS COPPER, ENTERS THE COURTROOM)

**BY THE COURT:**

**Q** Ms. Copper, if you'll come on down and have a seat.

You look a little nervous. Don't be nervous. Have a seat, ma'am. And what we're doing is we are asking each juror certain questions that we didn't want to ask out in front of everybody. And we're just – you know, felt like that it would be better because people might be more comfortable speaking without a big group out there. And so there was a couple of questions that we were asking about.

First concerning possible knowledge that you had about the case, if any. So have you read anything about the case or seen anything on the T.V. or newspaper or radio or talked to anybody or really have any knowledge about the case?

**A** Well, this time?

**Q** Yes, ma'am. Well, I mean, at any time since it happened in 1996.

**A** I read a little article about it. I think that was in last week's paper or something.

**Q** Okay. You read it in last week's paper?

**A** Yeah. Kind of glanced.

[1403] **Q** Okay. And have you – I guess, did you hear about it back in '96 when it first happened?

**A** Yes, sir.

**Q** And have you heard any talk through the years about the case or any – seen it in the newspaper and things?

**A** Yes, sir.

**Q** Has anything you saw, read or heard caused you to form an opinion as to the guilt or innocence of Mr. Flowers?

**A** I don't – could you –

**Q** Repeat the question?

**A** Right.

**Q** Right now, you have not heard any evidence at all.

**A** Right.

**Q** You know, you have not heard one – you know, any evidence.

**A** Right.

**Q** But without hearing any evidence at all, right now, have you already got an opinion as to whether he's guilty or not guilty?

**A** No.

**Q** And these things that you might have heard at some point in the past, can you put those things aside and not consider them but only consider the evidence that's presented here in court?

**A** Yes.

**Q** And so you won't let anything you've heard [1404] influence your decision if you're a juror?

**A** Right.

**Q** Okay. Next, concerns the possibility of the possible sentence. If Mr. Flowers is found not guilty, we do not get into anything concerning a possible sentence. But if he were to be found guilty, then at that time, the jury would decide what the jury felt the appropriate punishment would be. The options are life in prison without parole and the death penalty.

If the jury did not impose the death penalty, then there's an automatic sentence of life without parole. And I want to know if – could you consider both of those options as sentencing options if you were sitting as a juror?

**A** Yes.

**Q** And before hearing any proof at all, have you got any – are you leaning one way or another or can you just consider both of those equally as we stand here today?

**A** You're speaking of those two options?

**Q** Right. Life in prison without parole or the death penalty.

**A** Right. Yes.

**Q** Okay. And you understand we wouldn't even get to that phase unless he was convicted of the crimes for which he's charged.

**A** Right.

**BY THE COURT:** Okay. Mr. Evans, have you [1405] got any questions?

**BY MR. EVANS:** Yes, sir.

**BY MR. EVANS:**

**Q** Good evening, Ms. Copper.

**A** Good evening.

**Q** How are you doing?

**A** Fine. A little nervous.

**Q** Well, that's – there's nothing to be nervous over. We just got a few questions to ask you.

**A** Okay.

**Q** Now, I noticed that you told us the other day that you lived on Harper Street at one time?

**A** Yes, sir.

**Q** And that you knew where Archie and Lola and some of the Flowers lived over there down the street from there?

**A** Yes, sir.

**Q** That y'all lived on the same street.

**A** Not on the same street. Because they – they live on Cade Street, and I lived on Harper Street.

**Q** Don't they live at the corner of Cade and Harper?

**A** Well, I guess. I'm not – I – you know, my street is Harper and then its – as it go around – that's where I assume it was Cade Street. I'm not positive.

**Q** Okay. And you've stated that you worked [1406] with the defendant's sister at Shoe World?

**A** That's correct.

**Q** And which sister was that?

**A** Cora.

**Q** How long did y'all work together?

**A** Probably a year or two.

**Q** Okay. You worked with the defendant's father?

**A** Yes, sir.

**Q** How long did you work with him?

**A** Estimating, probably – possibly about the same, one to two years.

**Q** Okay. And I want to make sure my notes are right, because we can all write down things wrong. You stated that you knew his father Archie Flowers.

**A** Yes, sir.

**Q** You know his brother, Archie, Jr.?

**A** Yes, sir. I know his brother.

**Q** You know his mother Lola?

**A** Yes, sir, I do.

**Q** You know witnesses in this case, Hazel Jones?

**A** Yes, sir, I know her.

**Q** You know Kittery Jones, a witness in this case?

**A** Yes, sir, I know him.

**Q** And you know Danny Joe Lott, a witness in this case?

[1407] **A** Yes, sir.

**Q** And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connections to all of these people. Is that correct?

**A** It – it's possible.

**Q** Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?

**A** Yes, sir.

**Q** And it would make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?

**A** Correct.

**BY MR. EVANS:** Okay. Nothing further, your Honor.

**BY MR. CARTER:** What did she say?

**BY JUROR:** Correct.

**BY MR. CARTER:**

**Q** Ms. Copper, now you said you could put aside anything that you heard about the case up until now. Is that correct? In other words, any information you heard in the neighborhood or from the community or you might have read from an article or saw on T.V., you could put all that aside because you know that it's not supposed to be used on the trial. Is that correct?

[1408] **A** Correct.

**Q** You could put that aside. Now, this – you know a lot of people in this case and – but there's nothing – is there anything about any of these people that so important to you, like Mr. Flowers, Cora or those other people that you know, is there anything them [sic] that's so significant or so strong that you would not use your own judgment if – and would be hamstrung or be – or lose your own personal judgment as a result of knowing them?

That's probably confusing. Is it? It probably is. It's confusing to me.

What I'm trying to find out is just as you could put aside all the information you heard before about this case, could you not also put aside the fact – if you got picked as a juror, put aside the fact that you have met Mr. Flowers, that you know some other people in these case and be fair to the Tardys, the Stewarts, the Goldens, and Rigbys, and make whatever decision or vote

that you're going to make based on the evidence and the evidence only. Could you do that?

**A** I feel like I could. But, you know, it –

**Q** Is what you're saying –

**A** Of course, it would make me, you know, feel uncomfortable. But if I had to do it, you know, I got to do what I got to do.

**Q** Okay. So you're saying that – thank you. [1409] You're saying that you'll be uncomfortable. You'd prefer not to – I get the impression you're saying that you'd rather not be a juror. But if you got picked to be one, you would take the responsibility seriously, and you would follow the law and the rules that the Court give you, and you would put aside anything that you are required to put aside and make your evidence and make your vote based on just the evidence you hear in the courtroom. Is that fair to say?

**A** Yes, sir. That's correct.

**BY MR. CARTER:** Thank you. Thank you, ma'am.

**BY JUROR:** You're welcome.

**BY THE COURT:**

**Q** I just got – will you follow wherever the evidence leads in this case? Will you listen to the evidence and base your verdict on the evidence?

**A** Yes, sir.

**Q** And if the evidence showed Mr. Flowers guilty, would you find him guilty? I mean, could you find him guilty if the evidence showed he was guilty?

**A** Yes, sir.

**Q** And if the evidence showed or the State failed to prove his guilt beyond a reasonable doubt, could you find him to be not guilty?

**A** Yes, sir.

[1410] **Q** Then you're telling me, again, that you're going to the listen to the evidence and will wait and base your decision strictly on the evidence and no outside factors; is that correct?

**A** That's correct.

**BY THE COURT:** Okay. Thank you. You may step down. And when you go back out, don't talk about what we talked in here about with anybody out there about.

**BY JUROR:** Yes, sir.

**BY THE COURT:** Okay. Thank you, Ms. Copper.

(JUROR LEAVES THE COURTROOM)

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1640-1790 VOLUME 35 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1733] MRS. [sic] STEINER: – to the – to the process.

Your Honor, this is our objection under *Lockhart* and in general under the equal protection clause of the United States Constitution to the fact that by virtue of the elimination process to this date, even if you take the entire venire as of this morning, it had gone from a venire that was 42 percent African-American and 55 percent white. And there were two or three percent that who had not self-identified at the point at which

all the juror questionnaires were here on Friday and all the [1734] jurors had shown up.

As of this morning, that ratio had been halved on points, and the venire was 72 percent Anglo-American, white, and 28 percent African-American. With the course of today's challenges, I think that that ratio has not changed. That is still a statistically significant reduction in this venire.

And in fact, if the Court takes this, this situation and excuses all the remaining outstanding jurors – one, two, three, four, five, six – six of the African-Americans, we are going to be reduced. We were already reduced one by the challenges to 15 African-Americans. We will be down to fewer than 9 African-Americans.

And I, I can take a recess and get out my calculator. We are even statistically, significantly more reduced from the original venire that was summonsed, turned in jury instructions – jury questionnaires and is now before this Court. And I would renew the *Lockhart*, the Witherspooning had that significant discriminatory effect again.

And I would renew the motion with respect to – and 1, I would now re-urge this, when I've not previously urged. We had in the last trial urged that should this jury – that the prosecutor be, be precluded from making peremptory strikes because so much of this – because there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this [1735]

prosecution. It's happened actually – the predecessor in Flowers II, in Harrison County, found a Batson violation and ruled a strike by the State. So that in two proceedings and on the basis of what has been a persistent pattern of simply, you know, asking things that are clearly, if not flatly race or at least race-based –

THE COURT: Okay. Name one.

MRS. [sic] STEINER: Say what?

THE COURT: Name one.

MRS. [sic] STEINER: Yes. There were no questions asked of any juror who lived in the neighborhood of a white State's witness about what neighborhoods they lived in.

MR. EVANS: Your Honor, that –

MRS. [sic] STEINER: His main question –

MR. EVANS: I object.

THE COURT: Let her finish,

MRS. [sic] STEINER: One of his main objections – one of his lines of questioning was the neighborhood in which they lived. Acquaintanceship is fine. If neighborhood really matters for things to do with the acquaintanceship, there are anglo – white state's witnesses on our jury list and no questions were asked about people who lived in the neighborhood. We, frankly, don't think living in a neighborhood without some sort of acquaintance being known is, is particularly relevant. There has been – I mean –

THE COURT: As I recall it, there was a [1736] question about who lived in the neighborhood over there where Mr. Flowers' mom and daddy lived.

MR. EVANS: It is where he has lived, Your Honor. He lived at both locations.

THE COURT; And there, there is nothing race – there is no race issue there. And –

MRS. [sic] STEINER: Your Honor.

THE COURT: You know, I don't see why the State would be expected to ask the neighborhoods of where their own witnesses live, because I assume they know where their witnesses live. So I reject totally your statement that that is a race-based question.

MRS. [sic] STEINER: Your Honor, we are dealing with a venire that especially if we just excuse all these people of the first 45 that is so blaringly disproportionate to the population of this county.

THE COURT: You have got to look into the purpose, the reason. And the reason why is because Mr. Flowers has a number of brothers and sisters. His parents are well-known. Mr. Archie Flowers is apparently one of the most well-thought of people in this community. You have had countless numbers of African-American individuals that have come in and said they could not sit in judgment because of their knowledge of Mr. Flowers, and they could not be fair and impartial.

Counsel should have known that was going to happen from the first two or three trials – first three trials that had occurred over here. Counsel had an opportunity – because the first two trials, as you know, were tried [1737] somewhere else. But Mr. Flowers, as he had every right to do, and has an opportunity to be tried in his home county. The law allows that. But he cannot then come around and complain because people are excused because they know him.

And that is what – you know, if there is a statistical abnormality now, it is because almost every African-American that has been excused for cause, other than those on the death question, were because they knew him. And I mean, you know, he could have – if he would have wanted to elect to be tried somewhere else, there would have been a situation where he could have had a change of venue some location where there would be statistically more people of his race on there than is.

And I'll note that, you know, I think there was probably about and I'm not – because I haven't counted, but there is probably about seven or eight people that were on the death question alone, there was some that said because of death and other reasons – well, eight out of 600 that were originally called is, is statistically not material. Even eight out of 154 that finally started voir dire on Monday is statistically insignificant.

So you know, there is – nothing the State has done has caused this statistical abnormality. It is almost

chiefly because Mr. Flowers' family are such prominent people, and he has got so many relatives and so many friends and so many of his family members that have friends. But it is not anything that, you know, has [1738] shaken out that way. And as I say, this should not be a surprise to defense counsel, because that has been the way that has happened the past three trials. And so to claim surprise now about what you knew was going to occur is somewhat disingenuous.

MRS. [sic] STEINER: If the Court please, we are not necessarily claiming surprise. Although, this has been a much more radical reduction both in total numbers and in proportion than either of the prior two trials at which our office has been involved.

But Your Honor's suggestion that Mr. Flowers' right to a jury that comports with Fourteenth Amendment equal protection composition under *Castaneda* and *Swain* and all of those and a panel from which Batson – a reasonable equal protection challenge. His right to that, as well as his right to a fair and impartial jury, under the Sixth Amendment, those two things he has a right to that. And he has a right to be tried in his same county. And that he should not be required to choose between those two rights. Those are not necessarily –

THE COURT: And I did not say he had to choose between those two rights. But you know full well from past experiences in this county because of the number of people that know Mr. Flowers, they know his parents, they know his brother, they know his

sisters, and he – I mean he has got a large number of siblings. And all of those people – you know, I mean he is so well-known here that, you know, you've got a number of African-Americans that say I know him. I can't be fair. I know these people. [1739] I can't sit in judgment of their son. And there is –there is no way to avoid that if this case is tried in this county. Because this is the same type things that, that occurred in the previous trials where he had so many people that knew him.

You know, I don't – I hadn't kept a running count of anything in here but, you know, there is nothing that has – that has – no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family. And –

MRS. [sic] STEINER: Thank you, Your Honor.

THE COURT: – that is another reason.

And as far as the motion to prohibit the State from using peremptory challenges, there is no basis for that. Absolutely none. If the State looks at potential jurors and feels that they have right reasons for using peremptory challenges, that is their right. That is – each sides [sic] gets to make peremptory challenges.

But because Flowers III was reversed on Batson is certainly no grounds for saying that they should now be denied the right to use peremptory. The Supreme Court of this State has certainly never said that on a retrial you could not use peremptory challenges, nor has the United States Supreme Court ever said that.

**And so you're pulling that motion totally out of thin air and without any basis in law or in fact for making it. So it's denied.**

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**IN THE SUPREME COURT OF MISSISSIPPI**

PAGES NUMBERED 1640-1790 VOLUME 35 of 47

EXHIBIT _____

ELECTRONIC DISK _____

Case #2010-DP-01348-SCT

COURT APPEALED FROM: Circuit Court

COUNTY: Montgomery

TRIAL JUDGE: Joseph H. Loper Jr.

Curtis Giovanni Flowers v. State of Mississippi

Kathy Gillis, Clerk

TRIAL COURT #: 2003-0071-CR

* * *

[1756] (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT WITH THE COURT, THE COURT REPORTER, ALL COUNSEL, THE DEFENDANT AND THE CIRCUIT CLERK PRESENT, OUTSIDE THE HEARING AND PRESENCE OF THE PROSPECTIVE JURORS, TO-WIT:)

**BY THE COURT:** The Court will come back to order. The State may proceed in tendering.

**BY MR. EVANS:** Your Honor, the State will tender Juror No. 1, Ms. Sandra Hamilton. The State will tender No. 2, Ms. Susan O'Quinn.

**BY THE COURT:** Actually, No. 3.

**BY MR. EVANS:** I mean, we have – right. Juror No. 2, but No. 3 on the list. State will tender Juror No. 8, Mr. Alexander Robinson. State will tender Juror No. 12, Ms. Janelle Marie Johnson. Juror No. 14 will be S-1. State will tender Juror No. 17, Ms. Pamela Sue Chesteen. State will tender No. 18, Ms. Lillie Mae Laney. State will tender No. 22, Mr. Larry Wayne Blaylock. State will tender No. 25, Ms. Suzanne Winstead. State will tender No. 26, Ms. Jennifer Chatham. State will tender No. 29, Mr. Harold Waller. State will tender No. 30, Mr. Jeffrey Whitfield. State will tender No. 38, Mr. Barron Davis.

**BY MS. STEINER:** I believe that's No. 39. Is that 38 or –

[1757] **BY MR. HOWIE:** 38.

**BY MR. EVANS:** I think that's 12.

**BY THE COURT:** Yes. That's 12.

**BY MS. STEINER:** Your Honor, before proceeding, I am not, at this point, making a challenge under *Batson*. No pattern has yet been established. However, State's Strike 1 was of African-American – Juror 14.

Under the Mississippi Rules, I believe any objections on the preemptory [sic] strike, the juror has to be

at least brought to the Court's attention during the panel. As we have not yet made a prima fascia case, I am not – nor do I know that one will happen. I just want to reserve the right should a prima fascia case develop hereafter for any reason to include S-1 as part of the totality of the circumstances of that case.

**BY THE COURT:** That's certainly appropriate, I mean.

**BY MS. STEINER:** Thank you.

Your Honor, S-1 – D-1 would be Juror 1. We will accept Juror 3. We will accept Juror 8. We will accept Juror 12. We will strike Juror 17 as D-2. We will accept – my print is small – Juror 18, Lillie Mae Laney. We will accept Juror 22, Larry Wayne Blaylock. We will accept Juror 25, Suzanne Winstead. We will accept Juror 28, [1758] Jennifer –

**BY THE COURT:** Wait, we got –

**BY MR. EVANS:** 26.

**BY THE COURT:** You probably renumbered your list – but is it No. 26, Ms. Chatham?

**BY MS. STEINER:** 26, Ms. Chatham. Thank you, Your Honor. We'll' strike Juror 29, Harold Waller, as Defense Strike 3. And accept Juror 30, Jeffrey Whitfield, and accept Juror 39, Barron Davis –

**BY THE COURT:** It's 38, but I –

**BY MS. STEINER:** 38.

**BY THE COURT:** – knew who you were talking about.

**BY MS. STEINER:** I made the mistake of trying to put my list on short paper.

**BY THE COURT:** We – it's been obvious that I had original numbers and new numbers, and I've gotten mine confused at times so that's understandable.

**BY MR. EVANS:** State will tender Juror No. 40, Charles Davis. State will tender 42, Marcus Lamar Fielder. 44 will be S-2. 45 will be S-3. State will tender No. 47, Bobbi Leigh Davis.

**BY MS. STEINER:** Your Honor, before the Defendant exercises any further preemptories, we would like to move that a prima fascia case of discrimination against [1759] African-American jurors has now been shown. The State has been tendered four – I'm sorry – three African-American jurors –

**BY MR. HILL:** Four.

**BY MS. STEINER:** Four, and has stricken three of them. And that is a 75 percent strike rate of African-American jurors. The mere fact that one has been accepted does not preclude the finding of either a prima fascia case or ultimately of discrimination on the basis of race.

**BY MR. EVANS:** Your Honor, I think the proper procedure is going through the entire panel and

then, if the Court rules, producing the reasons. But I'll honor whichever way the Court says do it.

**BY MS. STEINER:** We have no objection since ultimately, the Court's going to have to consider the totality of the circumstances in any event so if we can just reserve that.

**BY THE COURT:** Well, I mean, it can be reserved. The State's going to have to come forward with race-neutral reasons at some point.

**BY MR. EVANS:** And we will ask the Defense to do the same.

**BY MS. STEINER:** Your Honor, I only think that if there's a prima fascia case –

**BY THE COURT:** We've got to see a prima [1760] fascia case before we take that issue up.

**BY MS. STEINER:** I have no objection to waiting till the end to doing it and just reserving all argument with respect to that when the entire panel has been tentatively struck.

**BY MR. HILL:** Okay. We got three tendered.

**BY MS. STEINER:** All right. I believe we – D-4 would be on Juror 40. We –

**BY THE COURT:** Wait, wait, wait. I'm on the right page now. Give me a second to get –

**BY MS. STEINER:** Charles Davis.

**BY THE COURT:** I see it now.

**BY MS. STEINER:** D-4 would be Charles Davis. No. 42, Marcus Fielder, we accept. And we would exercise D-5 on Ms. Bobbi Leigh Davis. Allow me to state, Your Honor, that although we challenged her on the basis of serving for cause on – as a relative, and we are in a position where there are remaining preemptory challenges, the fact of so many jurors coming after this one who have expressed actual opinion – who have advised they have actual opinions with respect either to guilt – with respect to guilt or innocence and close connections with Defense witnesses, it would simply be irresponsible [1761] not to reserve sufficient preemptory strikes to strike those people should they come up in the Court's tender. And that we would like to reserve the issue of whether or not this family member – these two family members could stay together on that issue alone despite the fact that we are not exercising a preemptory strike here on this –

**BY MR. EVANS:** I thought she did exercise D-5.

**BY MS. STEINER:** We would not have – the fact that we did – oh, I'm sorry, Your Honor. We would not have exercised this preemptory strike, but for the Court's ruling.

**BY MR. EVANS:** So it's the complete opposite of what you just argued, I guess.

**BY MS. STEINER:** I'm sorry. But as there may be jurors down the road, where we will run out of

preemptorys and cannot strike, and I would invite the Court's attention to that when it happens. Forgive me.

**BY MR. EVANS:** State will tender Juror No. 50, Mr. Bobby Lester. The State will tender No. 51, Mr. Burrell Huggins.

**BY MS. STEINER:** D-6 will be exercised against Mr. Bobby Lester. D-7 will be exercised against Mr. Burrell Huggins.

**BY MR. EVANS:** No. 53 will be S-4. State [1762] will tender No. 54, Ms. Patricia Box. The State will tender No. 58, Ms. Emily Branch.

**BY MS. STEINER:** D-8 will be exercised on Juror 54, Patricia Box. We will accept Juror 58, Emily Branch.

**BY MR. EVANS:** Juror 59 will be S-5. Juror 62 will be S-6. Tender Juror No. 63, Mr. James Hargrove.

**BY MS. STEINER:** Your Honor, may I have a moment?

**BY THE COURT:** You may.

(PAUSE)

**BY MS. STEINER:** Thank you, Your Honor. We, the Defense, will accept Juror 63, James Hargrove.

**BY THE COURT:** And I believe that gives us twelve, if I'm counting right –

**BY MR. HILL:** Yes, sir.

**BY THE COURT:** – but my counting hasn't been right. At this point, I made a initial determination, based on the first three strikes, the State is going to be required to put on race-neutral reasons as to the jury strikes, because I have noted now that five out of six strikes were African-American.

**BY MR. EVANS:** All right, Your Honor. Are you ready?

**BY THE COURT:** I am.

**BY MR. EVANS:** On Juror No. 14, [1763] Ms. Carolyn Denise Richardson Wright. She was sued by Tardy Furniture, after these murders, by the family members that will be testifying here today. They had to garnish her wages because of that fact.

She knows almost every Defense witness in this case. She has worked with the father of the defendant, Archie, Sr. She has worked with the sister of the defendant, Cora. She knows Connie Moore. She knows Jimmy Forrest. She knows Stacy Wright. She knows his sister, Sherita. She knows his sister, Cora. She knows Archie. She knows Larry Smith. She knows Danny Joe Lott. She knows Elaine Goldstein and is married to her cousin. She knows Charles Weems, and she is his cousin.

**BY THE COURT:** Does the Defense offer anything to rebut the –

**BY MS. STEINER:** Yes, Your Honor. Allow me to say that this is subject to – and I'd like to reserve the right to take a break after we've gone through this

process to review the voir dire, because this is – a lot of data has come in, and we have tried to anticipate to the extent possible, but – but yes. We have rebuttal with respect to Ms. Wright. Like No. 17, accepted by the State, she has extensive acquaintance with [1764] many witnesses involved – on – in the family. She had an account at Tardy's, like 75. There were – there were examinations about feelings pertaining to the account. The State conducted them only on Ms. Wright and another African-American juror who had – who apparently also had been in a dispute. And if the Court – one moment, I have a note taker here.

(PAUSE)

**BY MS. STEINER:** And in terms of in general acquaintance with witnesses and parties in this matter, the State has accepted Juror 29, 50, and 69, who have close personal acquaintances with many prospective witnesses in this case of an even more intimate nature – oh, I'm sorry 29 and 50. And with even more intimate, personal interrelationships with individuals who are witnesses in this case and apparently made little or no inquiry of them other than to seek fairness. No probing inquiry was made by the State with respect to any of these.

And we think it is, therefore, pretextual specific and particularly in light under – of the history of race discrimination in jury selection in this district and in this particular case found by the Mississippi Supreme Court in *State v.* [1765] *Flowers* after the third trial, the first one in this district.

**BY THE COURT:** Have you found any white jurors who were not struck who had been sued by Tardy Furniture? And have you found any who have worked with Mr. Archie Flowers?

**BY MS. STEINER:** I believe, Your Honor, that – that juror – that white Juror 17 has a business acquaintanceship with Mr. Archie Flowers – and possibly with Mr. Archie Flowers, Jr. I think she's the one who is the bank teller and has expressed acquaintances – I'm sorry. Archie – no. She has – with several other people in the family, however.

**BY THE COURT:** Well, I'll say for the record she did indicate she knows Archie and Lola Flowers.

**BY MS. STEINER:** I believe so.

**BY THE COURT:** I mean, she did say that, because I've got that in my notes.

**BY MS. STEINER:** And I think these are both basically in the work place interactions, and that they are comparable. Each has informed this Court and the State of an ability to be fair and unbiased, notwithstanding that.

Your Honor, there is no evidence of an actual lawsuit, but Ms. Wright's testimony [1766] concerning it was that it was not one that created hostility or ill will. It was one of simply a financial exigency that – that came up. I think she acknowledged there was a legitimate debt there and simply that she could not pay it. And that as a result, this happened.

And I think that that is – in *Flowers III*, what the Supreme Court of Mississippi said was that when you are looking at *Batson*, you look at the totality of the circumstances and you go beyond little excuses. And that the danger, certainly, in *Flowers III* is to devolve – for the *Batson* challenging process, to devolve into an effort of uncovering and coming up with facially neutral reasons that are merely a mask for actually racially discriminatory reasons, the desire to bleach or – I suppose, if it were the other way around – darken or make male or make female, the jury and that the Court, considering the totality of the circumstances, cannot simply express this distinction.

This is based on the 14th Amendment Equal Protection Clause. And there is a huge body of equal protection civil litigation. It is referred to by the United States Supreme Court in *Snyder*, the most recent case [1767] in which a verdict was reversed on *Batson* in the United States Supreme Court.

And basically, the situation is that you may go behind the facial neutrality if anything in the record suggests that one or more of the reasons may be either unconnected and related to what is really a material issue in this case and/or appears to have been pursued with more vigor in an attempt to uncover some excuse that is of less than universal relevance.

I do not believe a general question was asked of this jury by the State, Has anybody else been sued by Tardy's or by any of the other people? It's possible the Golden family. It's possible the Rigby family. It's

possible the Ballard family have been in litigation with other people in this jury that was not inquired into, very frankly.

The Defense didn't see it as relevant if they had put up their hands and say, "I have ill will against somebody on the base of litigation." You did ask if you had feelings about acquaintances. And I think this was fishing for pretextual facially nondiscriminatory reasons, and I would reserve the right at some point – I'm not saying this is the only one, but I – you [1768] know, I've had – I haven't even had a chance to – I'm tempted to do this in advance but the –

**BY THE COURT:** Well, the time is now if you've got any to bring out – I mean, you know, we can't, you know, stay on one juror and then move on and come back later and argue something else on that juror. So if you've got anything –

**BY MS. STEINER:** No, Your – I understand Your Honor. I would request that we complete this process here and that we be given an overnight recess – I understand the court reporter –

**BY THE COURT:** No, ma'am. You're not – I mean, that's absolutely an absurd request. I mean, you – right now, in *Batson*, you have an opportunity to come forward and show that somehow the State's excuse is pretextural. But we don't recess for, you know, days to thumb through everything that's been said. You've got – you have taken great pride in introducing the number of interns that – don't know how many, four or five – and you've got other people here assisting you

besides your interns. And so if you've got any other arguments to make on this issue, this is the time to do it.

**BY MS. STEINER:** Your Honor, as I say – [1769] may I complete the inquiry. I understand the court reporter is working on and has gotten for the Court preliminary draft notes of the entire voir dire, at least and certainly as to any witness –

**BY THE COURT:** We're not going to wait for the voir dire to be transcribed. It would take the court reporter days to get – I don't know how many days but, I mean, they rough draft. But that's all we've got available is a rough draft. And I guarantee you if I handed a rough draft to you or to Mr. Evans and the court reporter had something wrong in that rough draft and then when it – if it got to the point where it was appealed and there was something different, you would be raising that as an issue, saying that the court reporter had changed something in a transcript. So that's why rough drafts of the transcripts from court reporters are not done.

And again, you've had – you've had an awful lot of people here assisting you. And you know, if you can't offer any other reason, then we're going to move on.

**BY MS. STEINER:** All right. Your Honor, they have also – one of my many interns has handed me a note. They have accepted Juror No. 12, who's related by marriage to – to at [1770] least one Defense witness, John Johnson –

**BY MR. EVANS:** A Defense witness?

**BY MS. STEINER:** We have subpoenaed him as a witness – although he will be –

**BY MR. EVANS:** Oh, my gosh. She's calling my investigator as her witness? That's ridiculous, Your Honor.

**BY MS. STEINER:** You're right, Your Honor. He will be examined adversely.

Juror No. 42, which – who was accepted by the State, has been employed by witness Thornburg and Juror No. 22. Again, friends with John Johnson. Again, other witnesses –

**BY THE COURT:** But I don't think there's – the sheriff at the time. Does the State have anything to respond?

**BY MR. EVANS:** Yes, sir, we do, Your Honor. Since I have been accused, even though this juror admitted that she was sued, I would like to offer into evidence a copy of the judgment where she was sued by Tardy Furniture.

**BY MS. STEINER:** Is there also a garnishment order on that?

**BY THE COURT:** It's an abstract of justice court where she was sued. And for the purpose of this – I mean, obviously, this isn't going to go into the jury room or [1771] anything like that.

**BY MS. STEINER:** I understand.

**BY THE COURT:** But for the purpose of this proceeding, I'll allow it.

**BY MR. EVANS:** I think the record speaks for itself on everything else that I offered.

(STATE'S EXHIBIT NO. 1, JUDGMENT, WAS MARKED AND RECEIVED INTO EVIDENCE FOR PURPOSES OF THIS MOTION HEARING ONLY)

**BY THE COURT:** Anything else?

**BY MS. STEINER:** Yes, Your Honor. The State has accepted No. 63, who has two prior convictions of misdemeanors reduced from felonies. He's a white juror –

**BY MR. EVANS:** I haven't used any criminal convictions –

**BY MS. STEINER:** Your Honor, may I finish my –

**BY THE COURT:** Well, they didn't offer that as race neutral reason as to striking Ms. Wright so I don't believe –

**BY MS. STEINER:** Your Honor, I'm not suggesting that they are using that as a reason for striking Ms. Wright. It's the differential level of investigation. They obviously felt it important enough to go get abstracts of judgment on this African-American juror who, as freely as Mr. Hargrove, the white juror, discussed the [1772] prior legal problems they have had. They did – they went off for what is now Defense (sic) exhibit to the *Batson* hearing 1. For him, I had not seen

any indication or discussion that they had gone off and made abstracts of the judgments on Mr. Hargrove respecting his admitted legal troubles –

**BY THE COURT:** Well, reckon it might be that they don't have to prove a race neutral reason for striking him since they didn't strike him?

**BY MS. STEINER:** No, Your Honor. I'm saying the kind of investigation was different with respect to a white juror with prior litigation history discussed in court than it was with this African-American juror with a prior litigation history discussed in court.

**BY MR. EVANS:** Your Honor, for the record, I would like to put in the record that we checked every prospective juror on the list to see if they had ever had any run-ins or were sued by Tardy Furniture after these murders. I think that is very relevant. If the Defense can't see the relevance of that, something is wrong with them. It is very important where they have had run-ins with these folks that are going to be the key victims in this case.

[1773] **BY THE COURT:** Well, I want to correct something. Defense counsel maybe does not recall it. But the entire panel was asked first if they had ever had a charge account with Tardy Furniture. And then they were asked if they had ever been sued by Tardy Furniture. So that was asked of the entire group. It was not just asked of African-American jurors, as you claimed.

And I also will note that you have not – I mean, Ms. Wright worked with Mr. Flowers' father, worked side – I don't know side by side – but Wal-Mart here in Winona is not like some of these giant mega stores. It's a relatively small – smallest Wal-Mart, actually, that I know in existence.

So she has worked with Mr. Flowers' father. She has been sued by Tardy Furniture. I find those to be race-neutral reasons. You are correct in pointing out that some of the other State – the other jurors that have been tendered by the State – some of these, you know, white jurors know some of these people.

But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal-Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral [1774] reasons, and I find that the Defense has failed to rebut the reasons offered by the State.

**BY MR. EVANS:** Your Honor, and also, she worked with his sister, Cora.

**BY MS. STEINER:** I believe that's a different juror.

**BY MR. EVANS:** No, sir.

**BY MS. STEINER:** I – this was Wal-Mart –

**BY MR. EVANS:** She also worked with Cora at the shoe store.

**BY MR. HILL:** She said Shoe World.

**BY MR. EVANS:** Shoe World.

**BY MS. STEINER:** I'm –

(PAUSE)

**BY MS. STEINER:** No, Your Honor. That was –

**BY THE COURT:** I don't think this one worked with Cora at Shoe World.

**BY MS. STEINER:** Yeah, this is not the –

**BY THE COURT:** I think you're thinking of someone else.

**BY MS. STEINER:** That was a different juror. I believe that – if she – that was Juror 62, Dianne Copper. She worked with – at Wal-Mart shoe and jewelry and formerly at H&M Beauty Supply. And I think at one of those, she worked with Ms. – one of his sisters. But this juror worked only at – at [1775] Wal-Mart where Mr. Archie Flowers was a greeter at the door and probably saw more customers more often during the day than his fellow co-workers.

**BY THE COURT:** Well, again, she did work at the same place. If he was a greeter, then he was bound to have seen her every time she walked in the door. And, also, she was sued by the store. If – if the only reason the State offered was that she knows some of these Defense witnesses, then there might be something there. But the fact is knowing these Defenses witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked

with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

**BY MR. EVANS:** All right, sir. Juror No. 44, Ms. Tashia Renee Cunningham. On her questionnaire, she put she would not consider death or life. She was back and forth in questioning on what her opinion was on the death penalty. She knows the Defendant's sister, Sherita Baskin. Under questioning, she asked how close she worked with Sherita Baskin. I asked if she worked next to her, and she said she did not. That she worked on the complete opposite end of the line. After [1776] checking with ADP, I found out that the information I'd already received was true, that she works right next to her on the line, practically every day. So not only did she lie under voir dire, but she is a close friend of hers. She knows her. And her opinions of the death penalty are so fluctuating back and forth that we could not keep her.

**BY MS. STEINER:** If the Court please – is that your only reason? I've –

**BY MR. HILL:** Give us just one minute here.

**BY MR. EVANS:** In *Brown v. State*, 890 So.2d 901 clearly states, and the Court has upheld, the dismissal of jurors who have given inconsistent answers in regard to their ability to return a death sentence, citing *Pinky v. State*, 538 So.2d 329. And hers was just all over the board. It depended on who asked the questions as to what her answer was.

(PAUSE)

**BY MS. STEINER:** Thank you. Forgive me. Your Honor, the primary – first of all, I believe the witness who testified, testified she worked in human relations department. She looked at time cards, that there were about 25 people on this same line. She said [1777] that – she did not – she was not on the floor every day. Did not see it. We specifically asked if there was documentation that would establish, in fact, being assigned consistently to immediately adjacent positions on that 25-person line. She said she could bring it. The State does not appear to have brought in that evidence that could resolve the ambiguity.

Ms. Cunningham said that yes, they worked on the same line, but they – but they usually worked quite distant from each other, She freely acknowledged her acquaintance and friendship and workplace friendship but said she could set that aside and be fair and neutral.

The State has accepted those sorts of assurances from virtually every white juror it has tendered without more than a passing conversation including, of course, Juror No. 17, who I believe was acquainted with several people in the Flowers' family in the course of the business relationship. And as Your Honor pointed out, I think while Mr. Archie was working as a greeter at Wal-Mart, that there's probably not a person in Winona who wouldn't have said, "Mr. Archie's my friend."

**BY THE COURT:** Does the State have any response?

[1778] **BY MS. STEINER:** Um –

**BY MR. EVANS:** Your Honor, there has not –

**BY THE COURT:** I'm sorry. Are you finished? I mean, I – you may have been pausing, and I thought that you were stopped. If I've interrupted you, I – you kind of – I thought after I asked Mr. Evans, that you were about to say something else –

**BY MS. STEINER:** My ancestors would take breathers during their sermons.

Your Honor, I would also suggest that juror – actually, Your Honor, I remember this. Juror 38, Barron Davis, who the State tendered – it was quite interesting because I was watching his demeanor. In particular, he had put himself as B, which means he was not absolutely strongly in favor of the death penalty but had answered his questionnaire, yes. Yes. And he was asked by Your Honor on considering both. He actually hesitated a little bit and did – and gave, I thought, an answer that made him, at least in this universe of people who we've been talking to, at least more thoughtful and less certain on the death penalty than –

**BY THE COURT:** Wait a minute. Are – okay.

**BY MS. STEINER:** – that's who – is [1779] that –

**BY THE COURT:** Apparently, there were some people who were wanting to come in out there –

**BY MS. STEINER:** I'm sorry –

**BY THE COURT:** If you'll wait a second, because there were some people trying to come in, and I think the door, mistakenly, was not unlocked back there after lunch or I don't know what the deal is.

**BY MS. STEINER:** I'm sorry. I'm thinking of the young man, 30, Mr. Whitfield. He said, "I have mixed feelings about the death penalty." And he did, when Your Honor questioned him, then said, "But yes, I can set those aside," much as this witness – what much as this juror did. Thank you – I apologize. 50 is Mr. Davis, who had the relatives on the jury.

And the – and we would say the – I think if you were – view the trans – the rough notes, that he expressed at least mixed feelings with respect to the death penalty, just as Ms. – Ms. Wright did. The – as many thought – yeah, that –

I apologize. I am thinking of the young man, and that is Juror No. 30. And I think the record will reflect that he had expressed mixed feelings. And very frankly, [1780] the Mississippi Supreme Court observed, in particular in this case, that using death penalty attitudes has been – they would find – they did not find it as the exact *Batson* grounds for reversal but found they were indicative of pretext and suspect, were the words they used. And this is a jury where there has been soul searching with respect to the death penalty

and some dislike of it on several of the jurors, but on most particular No. 30, Mr. Whitfield.

**BY THE COURT:** Any response from the State?

**BY MR. EVANS:** Yes, sir. Mr. Whitfield was clear. He said that he believed in the death penalty. He was mixed about his feelings on the death penalty. He could give the death penalty. That he could definitely give the death penalty if there was a rule in the case. He never, at any point, even hesitated on whether or not he could even consider the death penalty. And the juror that I have struck said that she could not consider giving the death penalty. It's a drastic difference. It's daylight-and-dark difference.

**BY MS. STEINER:** If the Court, please, under *Batson*, I believe the Supreme Court has said that the State standard falls on what it [1781] articulates in the first place and to come up with death penalty hesitation plus after we have –

**BY THE COURT:** Well, my record – my notes show that Ms. Cunningham was asked about the death penalty. She said she might consider it. She don't – then she said, Don't think so. Doesn't know. And then finally, after Mr. Carter was trying to rehabilitate her, she said, Possibly, she could. She put on her questionnaire that she could not consider the death penalty. That's greatly different from Mr. Whitfield, who said from the beginning on his questionnaire that he generally favored the death penalty and could consider it.

Also, Ms. Cunningham apparently from what the other – this outside witness that was brought in, said she works nine or 10 inches from Mr. Carter – I mean, Mr. Flowers' sister. You made some statement about clearing up any ambiguity. You know, there – as far as this witness that came in and testified yesterday, her testimony was fairly – it was totally unambiguous.

**BY MS. STEINER:** Not that it was ambiguous. That it was not verified. There were records that could verify –

**BY THE COURT:** Well –

[1782] **BY MS. STEINER:** – and she said she could provide those. The State has elected not to come forward with that verification.

**BY THE COURT:** I'm not aware of any requirement the State has to do that. They brought a witness in, and she swore under oath to these facts. And Ms. Cunningham's all-over-the-map response to the death penalty, plus her situation about working so closely with Mr. Flowers' sister, in my mind, the State has shown race-neutral reasons for that strike –

**BY MS. STEINER:** Your Honor –

**BY THE COURT:** – and the Defense has failed to rebut that race-neutral reason that was given.

**BY MS. STEINER:** Once again, we would urge a continuance and provision of the rough transcript so that it could be put in the court record and if –

**BY THE COURT:** If there's an appeal in this case, there will be a transcript on this if this case is appealed. But at this point, I don't need a transcript. I wrote notes all over this – these – there was a couple of these prior jurors when y'all were moving to strike for cause that I wanted to look back on. But I'm – the State has definitely provided race-neutral reasons as to [1783] Ms. Cunningham.

**BY MS. STEINER:** Your Honor, I believe – I understand this would be an aid of memory, and Your Honor has been using it. And there's no reason why it cannot be fully protected –

**BY THE COURT:** If I was having a memory problem, I would do that. But I'm not. I've got notes here. I have made my ruling on this, and we're going to move to the next one now.

**BY MR. EVANS:** May I proceed, Your Honor?

**BY THE COURT:** You may.

**BY MR. EVANS:** The next juror is Juror No. 45, Ms. Edith Burnside. She stated that she knows the Defendant. She knows Hazel Jones. The Defendant was very good friends with both of her sons. He has visited in her home many times. She also was sued by Tardy Furniture, and a garnishment was issued against her. She tried to deny that and said that she just settled with them when she came back but she was, in fact, sued by them.

She also, at one point, said she could not judge. She stood up when I asked about the ones that could not judge. She said that the fact that she knew the Defendant so well, he had visited in her home, and was such close friends with her [1784] sons might affect her decision in this case.

**BY THE COURT:** Response?

**BY MS. STEINER:** If the Court, please. Again, the differential investigation of inquiry of these – of this individual with respect to possible litigation with the Tardy family. No similar questions were pursued with possible litigation with any of the other victim families or any of the – the Defendant's families and certainly nothing to indicate that anything other than what they expected to find. And I believe Ms. Burnside's testimony was that she actually had a very fairly intimate relationship with Ms. Bertha Tardy's husband's first wife. She was the caregiver.

And that this was – she thought, before she left for Nevada, that this was a gift, basically, from the business; that when she returned, again, she discovered that this was not, in fact, such a gift and was financially unable to pay it. And there was no animosity in her towards them for having done this. She acknowledged that if they wanted – if they wanted the money, they could – they were owed it. It was not an illegitimate thing.

And the differential investigation, again, is indicative that for the State of [1785] Mississippi in this case, the process of preemptory striking has become a

search for facially non-discriminatory excuses for an effort to remove African-Americans from this jury as it did in *Flowers III*.

**BY THE COURT:** Well, at this point, her statement – I mean, the offer – the reason the State's made – I have notes as to all that. She first stood up when the district attorney asked her if she could judge, and she said she could not. I have seen no white person that was left on this panel that responded in a similar fashion. And I've got a note here that said she stated that she'd preferred not to judge. Again, I don't have any notes that would indicate that there was any white person that said that.

She was sued by Tardy Furniture. I do not recall her indicating that she thought it was a gift. She did say she moved to Nevada and then came back and was sued, but – and there's no evidence that any murders occurred on any business property that was owned by any other individual than Tardy Furniture or that anybody else owns a business. So I don't think that the fact that the State didn't ask about other businesses that were not related to this case have any merit.

[1786] But I think the State has offered numerous race-neutral reasons for this strike, and there are not white jurors that were left on the panel that have the race-neutral reasons the State has offered for striking Ms. Burnside.

**BY MS. STEINER:** Your Honor, we would incorporate all of the other – including No. 17, who was widely –

**BY THE COURT:** I offered you the opportunity, and I've made my ruling and so we'll move to the next one now. I don't like to be continually challenged after I've made a ruling. And so we will move now to – I believe it was S-4?

**BY MR. EVANS:** Yes, sir. S-4 is No. 53, Ms. Flancie Young Jones. She is related to the Defendant. She admitted that she was related – she was cousin – or the Defendant's sister, Angela Jones, is her niece. So she said she guessed she must be related to him. Well, I guess so. He would be her nephew.

She was late two different times, appearing in court approximately 30 minutes late both times. She – hold on a minute. Let me read my writing. She was back and forth all over the place on her opinion about the death penalty. She admitted – and I [1787] thought it was very strange when I asked her if she had lied on her questionnaire about her opinion of the death penalty, she said that she had. She – on her questionnaire, it states that she is strongly against the death penalty. And she comes in now trying to say that she is for the death penalty. And her – like I say, her only explanation for that change was that she said she had lied on her questionnaire.

**BY THE COURT:** But I think between being related to the Defendant, her views on the death penalty, she is also related to Hazel Jones – which, of course, she's going to be related to all of the Defendant's family. I think those reasons are definitely clear

race-neutral reasons for why we could not leave her on the jury.

**BY MS. STEINER:** Your Honor, I think it seems – her – her relationship is to Ms. Hazel Jones by marriage. And it is Ms. Hazel Jones' son who is married to a lady named Angela or Andrea.

Now, I find that is not the same person as the Angela Jones married to a Mr. Jones in Prairie View, Texas. So yes – so he is not the nephew. There is a in-law relationship to the entire family through – she's married to – her husband and Hazel [1788] Jones are brother-in-law and sister-in-law, as I understand it. And – but she says that she is not connected with that wing of her husband's family, that she has no actual knowledge, that she had to come to court to learn of such connections. They accepted juror –

(PAUSE)

**BY MS. STEINER:** Your Honor, maybe we didn't get to this juror. They seemed to have no problem certainly during voir dire with the marital – marriage relationships when they were defending juror – I'm sorry. There were several jurors who had relationships by marriage. In fact, we made challenges on – on Juror 111, whose relationship by marriage for 25 years to Ms. Margie in the D.A.'s office, and the Court found that in-law relationships are of minimal significance and denied our cause challenge –

**BY THE COURT:** Well, now, if the State was moving to strike this person for cause, my ruling

would be the same. But this is not a situation where the State is moving to strike this person for cause.

**BY MS. STEINER:** Again, we would cite the totality of the circumstances and the apparent cherry picking of the

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[1790] **[BY THE COURT]** And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

But, you know, her lying on the questionnaire and then admitting that and then changing what she was saying in court is grounds alone for – or race-neutral grounds. But that, plus these relationships where Mr. Flowers is married – Mr. Flowers' sister is married to her nephew and Hazel is married to her brother-in-law are race-neutral grounds. So I'm – I make a finding that the Defense has failed to overcome and failed to rebut the proof that's been offered by the State of Mississippi.

**BY MS. STEINER:** Your Honor, for fear of waiving something, my shortcomings as a defense attorney to Mr. Flowers would be evident if I did not at this point, point out, Your Honor, that they have accepted Juror 51, who lied on his questionnaire about – and to this Court – until finally called in for further voir dire with respect to his actually having been through the voir dire process in this Court before. And believe that that is a distinction without a difference. They accepted Mr. Huggins, 51.

They apparently don't care if white people lie. They do care if – or clarify [1791] themselves or say things on their questionnaires that it turns out were not completely consistent. They do care if black people do. It is part of the totality of the circumstances that make this an additia pretext in this court, and I do have to preserve that record. I spent several hours talking to the – several minutes talking to the Mississippi Supreme Court about just that question.

**BY MR. EVANS:** I must have missed that question because I never saw a question that he was asked on the questionnaire about whether he had been on another panel or not.

I think referring to him as a liar is completely wrong. There was no indication that he lied on anything. That was not brought up. When it was brought up, he said, Yep, I was on another panel. There were a lot of people that were on this panel that were on another panels. Some never were asked about it. He did not comment to any of that. And strictly, he definitely, as the Court stated and I stated earlier, didn't sit in that chair right up there and admit to the Court and everybody else that he had purposely lied on his questionnaire.

**BY MS. STEINER:** Your Honor, he said to the Court the first thing he had heard about [1792] this case was when he walked in and sat down and began to be qualified this past Friday. Those were the first words out of his mouth. When he came back in and had

this discussed with him and then, Oh, oops. Yeah, you're right. I did this two years ago.

Your Honor, this is a degree of questionable seriousness or voracity [sic] of wanting – wanting to be on or off that is equally of the same nature as what they are objecting to here in –

**BY THE COURT:** Well, I have made my ruling, but I'll reiterate that she said up here from this stand, "I lied on that questionnaire." I never did hear Mr. Huggins say he lied, and you didn't ask him. You know, you didn't ask him when he was called back in, Did you lie when you said that? So I can't know his frame of mind of why he didn't originally point out he was in the original voir dire. But he clearly did not say that he lied.

And again, the statement on the questionnaire said she could not under any circumstances consider the death penalty. And now she, in court, is saying that she can. That is vastly different. And also, again, these relationships she's got.

I do not have any white juror that [1793] has been allowed to remain on that had those issues. And so I will again restate that I find that there has been a failure to overcome the race-neutral reasons that was offered by the State of Mississippi. And I that's all as far as the race – I think that would –

**BY MR. EVANS:** No, sir. No, sir. It's two more strikes that we'd made, S-5 and S-6.

**BY THE COURT:** Okay. I'm sorry. Yeah, that's right.

**BY MR. EVANS:** Juror No. S-5, Ms. Julia Ann Nail is a white female, but I would – since we're going through this, I might as well just state my reasons for striking her, too. She said that she could consider both, but she said that she preferred life without parole. So because of that reason, we have struck her, which is similar to some of the others that we have been striking. Juror No. – well, I don't guess the Court needs to rule on that one, does it?

**BY THE COURT:** They're only attacking the strikes as to African-Americans, so –

**BY MR. EVANS:** Okay.

**BY THE COURT:** – but she did say she was strongly in favor of life without parole.

**BY MR. EVANS:** Juror No. S-6, Ms. Dianne Owens Cooper or Copper – I'm not sure how [1794] she pronounces it. And I was wrong on the other one. This is the one that worked with two of the Defendant's family members. She has worked with his father, and she has worked with his sister, Cora, at the shoe place. She stated that she knows Curtis' family. She's stated that she leaned toward favoring his side of the case. She knows many Defense witnesses.

And the reason I point that out, it's not just that she knows those witnesses, but that because of knowing the family and – working with those two family members, she stated that that relationship would

influence her. She later said that – well, she could not have an open mind. And then she was equivocal back and forth. But because of all of those relationships, she clearly stated, when I asked her, that they would influence her. She could not have an open mind, and she was leaning toward the Defendant's family.

**BY THE COURT:** I think that's –

**BY MS. STEINER:** Thank you. Your Honor, again, they have accepted – virtually every white juror they have accepted has had some connection, personal or professional as Ms. Copper has a professional workplace relationship with someone who is a likely [1795] witness in this case, including Juror No. 17.

This is the juror, Your Honor, who apparently was being fished with living in the neighborhood. And they asked, In the neighborhood? She said it was a couple of blocks away. And Harper Street and Cade Street intersect, she said, a couple of blocks from her home. She specifically said that she did not know the Flowers family well enough to be able even to say how many houses from the corner it was. She knew it was down where Cade Street began. This is a witness who the State – and not just with respect to the people already struck – but the State has repeatedly stood up and said it really doesn't matter if they're acquainted, if they're not close. Visitors in the household take the people's word for it. This is not an important relationship. These are business relationships.

And again, under the totality of the circumstances and most particularly the differential questioning of

this witness insisting that – that's the case. Moreover, they have accepted Jurors 40 and 50, each of whom testified in this court as they were being voir dired that they have formed an opinion. There was great – the State properly, as it should, went after them and [1796] said, But you can lay that aside. And I don't believe they attempted to ask her if she could lay hers aside. I believe the Court elicited that from her. I believe we elicited that from her. But when this black juror expressed an opinion that she had formed or had a leaning, they didn't bother to try and rehabilitate her as they did with Jurors 40 and 50, who they have tendered here this afternoon.

**BY THE COURT:** Well, the Court – neither No. 40 or No. 50 stated that they were learning toward the Flowers' family in this case. And she did. There – there wasn't anything for them to rehabilitate because they didn't say they were leaning towards the Flowers family. And –

**BY MS. STEINER:** They didn't say –

**BY THE COURT:** I'm making my ruling now, ma'am. I'm tired of you interrupting me constantly.

Also, she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationship with those two individuals in Mr. Flowers' family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's no indication that [1797] Ms. Chesteen has ever

worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the – S-6 with Ms. Copper and any white juror that was left on the panel.

**BY MS. STEINER:** Again, Your –

**BY THE COURT:** And now, if the State will proceed to –

**BY MS. STEINER:** Your Honor, may I be heard?

**BY MR. EVANS:** The State will tender No. 67.

**BY MS. STEINER:** May I be heard before –

**BY THE COURT:** Ma'am, I'm tired of you inter – I mean, I've made a ruling. And I don't know – you know, when you have something to say, you need to say it before I have made the ruling. But after I make a ruling, you're constantly arguing with the Court and constantly coming forward with other things. And I'm kind of getting tired of that.

**BY MS. STEINER:** Your Honor raised in your ruling the fact that the opinions expressed – the opinions of 40 and 50 were not opinions in favor of the Flowers family. Your Honor, neither of these jurors advised as to what that opinion was. It is equally likely if you have an opinion it could be for [1798] either side. These jurors did not express an opinion and –

**BY THE COURT:** You're absolutely correct. They did not, and she did. That makes it different. That

is the difference. She said, "I would tend to lean toward favoring that family." And that – that is different than somebody that expresses no statement to that. And again, none of these others worked side by side or in the same Shoe World with Mr. Flowers' sister. Nobody – that is, nobody that's on the panel that worked with Mr. Archie.

And now again, if the State will tender –

**BY MR. EVANS:** Tender 67.

**BY THE COURT:** Let me get back to my – I'm trying to – I don't know if you need to just go ahead and tender three alternates or –

**BY MR. EVANS:** I thought we were just going to do one at a time with one strike per alternate?

**BY THE COURT:** Well, yeah. That is how the rules say.

**BY MS. STEINER:** We would – we would strike No. 67.

**BY THE COURT:** So D –

**BY MR. EVANS:** All right. We'll take 68 [1799] as the first alternate. And we will tender 69 as the second alternate.

**BY MS. STEINER:** We will – DS-2 will be Juror No. 69, and we are now out of challenges with respect to –

**BY THE COURT:** No. I said I was going to have three alternates, but –

**BY MS. STEINER:** Oh.

**BY MR. EVANS:** Okay, your Honor –

**BY MS. STEINER:** Do we have a third strike for –

**BY THE COURT:** Excuse me?

**BY MR. EVANS:** We will accept No. 72 as the second alternate.

**BY THE COURT:** Well, let me – on Julia Ray, I assume there was not any – I assume that you did not – that you did not –

**BY MS. STEINER:** No, we did not exercise a preemptory.

**BY THE COURT:** Then she will be Alternate 1. And I mean, the order in which these alternates are put on would be the order in which if somebody got sick or had somebody die, like we had a juror earlier in the week, family member or something – so anyway, we got –

**BY MR. EVANS:** We will accept No. 72 as the second alternate.

**BY MS. STEINER:** Your Honor, we would [1800] strike – DS-3.

**BY MR. EVANS:** They've already used one strike –

**BY THE COURT:** Well, they've used DA-1 – let me finish – Defense Alternate 1. When I say DA-1, it sounds like I'm – that I'm – this is Defense Alternate Strike 1 on Amason. Defense Alternate Strike 2 on Carpenter. And I'm taking Defense Alternate Strike 3 on Colbert; is that correct?

**BY MS. STEINER:** That is correct.

**BY MR. EVANS:** All right. We will accept 75 as the second alternate then.

**BY MS. STEINER:** Your Honor, for the record, this is a juror who we had challenged under *Murphy* and *Reynolds* for impartiality. We are out of strikes here. We are not – it is not possible for us to exercise a preemptory strike against this prospective juror because we have had to expend all three of our preemptories.

We would like to reserve our right to – should there be an appeal – to challenge the – to raise the challenge for cause that would – given to this juror earlier which was overruled by the Court as we are without further preemptories with which to challenge this juror.

**BY MR. EVANS:** Your Honor, for the record, [1801] the only reason we're to that juror is the Defense allowed them to change the rules. It's my understanding that there was going to be three alternates, one strike per side per alternate. They had already used a strike for the second alternate. They asked to use another strike for that alternate, and the Court let

them. So it's because they asked for an extra strike to use on that alternate that we even get to Linda Martin.

**BY MS. STEINER:** All three of these jurors were cause challenges by the Defendant.

**BY THE COURT:** And I'll have you now tender one more alternate.

**BY MR. EVANS:** Tender 78 as the third alternate.

**BY MS. STEINER:** We have no more preemptories, but we will accept her.

**BY THE COURT:** I'm going to call the jury in and have them seated, and –

**BY MS. STEINER:** Your Honor, could we recite who the jurors are?

**BY THE COURT:** I'm showing No. 3, O'Quinn; 8, Robinson; 12, Johnson; 18, Laney; 22, Blaylock; 25, Winstead; 26, Chatham; 30, Whitfield; 38, Davis; 42, Fielder; 58, Branch; 63, Hargrove; 68, Alternate 1, Ray; Alternate 2, 75, Martin; Alternate 3, Williams, 78.

* * *

No. 17-9572

# In The Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## JOINT APPENDIX VOLUME II


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TABLE OF CONTENTS

Page

Relevant Docket Entries ..... 1

Defendant's Motion to Bar the Prosecution from Exercising Peremptory Strikes at All, or at Least from Exercising Them Against Non-White Venire Members, During Jury Selection or in the Alternative to Bar the Seeking or Imposition of the Death Penalty in the Event of Conviction [Vol. 13, C.P. 1651-1674][1] (Sept. 12, 2008) ..... 3

Notice of Renewal and Adoption of Motions from the Previous Five Trials [Vol. 15, C.P. 1928-1931] (Apr. 9, 2010) ..... 37

Excerpts of group *voir dire* transcript [Vol. 29, Tr. 789-790; 792-794; 861-863; Vol. 30, Tr. 905-910; 912-913; 915-916; 918; 920-935; 955; 958; 960; 964-968; 970-975; 985-991; 1002; 1027-1030; Vol. 31, Tr. 1037-1039; 1075-1076] (Jun. 7-8, 2010) .. 45

Transcript section of motion arguments during jury selection [Vol. 31, Tr. 1095-1097; 1101-1102] (Jun. 8, 2010) ..... 97

Transcript of individual *voir dire* of Carolyn Wright [Vol. 31, Tr. 1161-1165] (Jun. 8, 2010) ..... 101

---

[1] "C.P." refers to the Clerk's Papers contained within Volumes 1 through 23 of the record submitted to and considered by the Mississippi Supreme Court in connection with Flowers' appeal of his 2010 convictions and death sentence. "Tr." refers to the Trial Transcript contained within Volumes 24 through 47 of that same record.

TABLE OF CONTENTS – Continued

Page

Transcript of individual *voir dire* of Pamela Chesteen [Vol. 31, Tr. 1165-1175] (Jun. 8, 2010)..... 107

Transcript of individual *voir dire* of Harold Waller [Vol. 32, Tr. 1201-1205] (Jun. 8, 2010) ..... 120

Transcript of individual *voir dire* of Tashia Cunningham [Vol. 32, Tr. 1291-1298] (Jun. 9, 2010)..... 126

Transcript of individual *voir dire* of Edith Burnside [Vol. 32, Tr. 1298-1308] (Jun. 9, 2010) ..... 135

Transcript of testimony by Crystal Carpenter [Vol. 32, Tr. 1327-1335] (Jun. 9, 2010)..... 147

Transcript of individual *voir dire* of Bobby Lester [Vol. 32, Tr. 1335-1337; Vol. 33, 1338-1352] (Jun. 9, 2010)..... 157

Transcript of individual *voir dire* of Flancie Jones [Vol. 33, Tr. 1359-1365] (Jun. 9, 2010).... 176

Transcript of individual *voir dire* of Diane Copper [Vol. 33, Tr. 1402-1410] (Jun. 9, 2010)..... 184

Transcript section of counsel arguments during jury selection [Vol. 35, Tr. 1733-1739] (Jun. 10, 2010)..... 194

Transcript of juror tendering, peremptory strikes, and *Batson* argument [Vol. 35, Tr. 1756-1790; Vol. 36, 1791-1801] (Jun. 10, 2010)..... 202

Excerpts of Supplementation of Motion for JNOV or in the Alternative for a New Trial in Response to Order of June 30, 2010 [Vol. 22, C.P. 2953; 2964-2966; 2973] (Jul. 23, 2010)..... 242

TABLE OF CONTENTS – Continued

Page

Opinion of trial judge denying motion for JNOV [Vol. 22, C.P. 2999-3040] (Aug. 6, 2010)..... 247

*Flowers v. State of Mississippi*, 240 So.3d 1082 (Miss. 2017) (op. on remand) (Nov. 2, 2017) ..... 299

Letter from Clerk of the United States Supreme Court Granting Petition ..... 527

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, MISSISSIPPI

| | |
|---|---|
| STATE OF MISSISSIPPI | PLAINTIFF |
| V. | NO. 02-245 |
| CURTIS FLOWERS | DEFENDANT |

**SUPPLEMENTATION OF MOTION FOR JNOV OR IN THE ALTERNATIVE FOR A NEW TRIAL IN RESPONSE TO ORDER OF JUNE 30, 2010**

(Filed Jul. 23, 2010)

COMES NOW, Curtis Flowers, by counsel, and for response to the Order of the Court entered June 30, 2010, (and as to which, due to the unavailability of counsel to prepare the requested response as more fully set forth in Defendant's Motion for Additional Time, additional time was sought to respond) and responds to the requests in the Order as follows as to each point set forth in the Motion For JNOV Or In The Alternative For A New Trial, and supplements said motion as follows:

1. On Friday, June 18, 2010, Mr. Flowers was convicted of capital murder. On Saturday, June 19, 2010, he was sentenced to death.

* * *

24. The trial court improperly overruled Mr. Flowers' *Batson* objection to the State peremptorily striking five of the six African-American jurors tendered to it for reasons that were pretexts for discrimination. Even on the basis of the matters the Defendant

was able to establish despite the error set forth below in failing to grant a recess and access to the draft transcript of the voir dire, the Defendant established pretextuality of the reasons advanced.

**Response:** The Defendant respectfully submits the following further argument to considered by the Court on this point. The Mississippi Supreme Court has recently reiterated that it is incumbent upon a Defendant in establishing the requisite totality of circumstances to identify all factual matters suggesting pretext in rebuttal to any purportedly non-racial reasons offered by the State at the time the *Batson* challenge is made, *Pitchford v. State*, ___ So.3d ___, ___ (Miss. 2010), 2006-DP-00441-SCT at ¶¶ 28-32, 2010 WL 2521745 at *5 (Miss. 6/24/2010) (opinion not yet released for publication in the permanent law reports.) or, in the alternative, to raise matters establishing pretext not raised during jury selection at the motion for new trial stage. *Booker v. State*, 5 So.3d 356 (Miss. 2008) (upholding trial court's findings based on evidence concerning pretext offered only on motion for new trial). This court denied the request of the Defendant during the jury selection process for a recess and access by the parties to the already prepared draft transcript of the voir dire of the jurors in order to fully present to the court all factual bases establishing pretext and otherwise establishing racial discrimination in the use of peremptory strikes, thus, erroneously, despite the Defendant's best efforts, precluding him at that stage from complying with the Supreme Court's procedural directives at that time. *See Pitchford*, ¶¶ 28-32. Having done that, it is incumbent upon this court

to take up the matter on motion for new trial, which requires access to the transcript in order that the Defendant can examine the entire jury selection process for evidence that, upon the totality of the circumstances, establishes racial discrimination as is required by ***Batson*** and its progeny in both the U.S. and Mississippi Supreme Courts. See *Snyder v. Louisiana*, ___ U.S. ___, 128 S. Ct. 1203 (2008), *Flowers v. State*, 947 So.2d 910 (Miss. 2007). No further argument can be made in light of fact that Defendant's request for the transcript necessary to do this was heretofore denied and Defendant cannot, therefore, determine if there is additional support that would not be redundant of that already presented in the pretrial motions on these issues and/or at trial; the only additional proof anticipated would be request to review transcript of voir dire and jury selection at such places where the Defendant asserts that evidence of pretext, disparate treatment and other indicia of discrimination is to be found, had the request for same not been denied by the Court both at the trial and in its order of June 30, 2010.

25. This is based, *inter alia*, on the reasons set forth in his pretrial motions, on the record of the voir dire and of juror questionnaires actually conducted and on file in the record in the instant matter, and on the demonstrated history of racial discrimination in jury selection by the District Attorney's office prosecuting this matter, and for such additional reasons as may be adduced at a hearing hereon after preparation of the requested transcript of the jury selection process. These materials establish, and/or will establish, all the

indicia of pretext set forth in Mississippi and federal law, and establish on the basis of the totality of the circumstances that the State engaged in race discrimination in the jury selection in this matter. *Snyder v. Louisiana*, 552 U.S. 472 (2008). Mr. Flowers expressly reserves the right to supplement the allegations of this Motion insofar as it concerns the *Batson* matters to include information contained in the transcript and records pertaining to jury selection and voir dire at such time as that transcript is provided.

**Response:** See response set forth at ¶ 24, *supra*.

26. The trial court erred in failing to grant the Defendant's requested recess for the purpose of preparing to provide the necessary rebuttal to the State's so-called race neutral reasons for peremptorily striking all but one of the tendered non-white jurors in this matter.

**Response:** See response set forth at ¶ 24, *supra*.

27. The trial court erred in refusing Defendant's request that he and the State be provided a copy of the draft transcript of the voir dire that was prepared for the trial court by the court reporter and on information and belief used by the trial court it in ruling on the Batson objections and also on ruling on certain challenges for cause. This violated defendant's rights under the Sixth and Fourteenth Amendments to present a defense, to be tried by a fair and impartial jury, and to effective assistance of counsel in defending him on these charges.

**Response:** See responses set forth at ¶ 24, *supra*.

28. Mr. Flowers was also denied his Sixth Amendment right to trial by a fair and impartial jury and his Fourteenth Amendment rights to due process and equal protection because the jury that sat in judgment on him was composed of less than 10% African-American citizens, and was selected from a county with nearly a 45% African-American population.

**Response:** See responses set forth at ¶¶ 5, 6, 8, and 24, *supra*, and authority cited in ¶ 17 and in all pretrial motions concerning jury composition.

* * *

Respectfully submitted,

CURTIS GIOVANNI FLOWERS,
Defendant

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**IN THE CIRCUIT COURT OF**
**MONTGOMERY COUNTY, MISSISSIPPI**

**STATE OF MISSISSIPPI**

**VS.** **CAUSE NUMBER**

**CURTIS GIOVANNI FLOWERS** **2003-0071-CR**

## OPINION

(Filed Aug. 6, 2010)

This court presently has before it a Motion for J.N.O.V. or in the Alternative for a New Trial, that was filed by the Defendant, Curtis Giovanni Flowers, on June 28, 2010. This motion follows a jury verdict rendered on June 18, 2010, finding Flowers guilty of four counts of Capital Murder, and a jury verdict rendered on June 19, 2010, finding that Flowers should be sentenced to death.

In the motion, Flowers requested that this court withhold consideration of the motion until such time as a transcript of the trial could be prepared. In an order dated June 30, 2010 and entered on July 2, 2010, this court denied that request finding that defense had sufficient knowledge of the facts of the case to enable them to brief or argue the motion without a transcript of the trial proceedings. This court found that a transcript of the proceedings would not be helpful to the court in consideration of the motion. In that order, this court ordered the attorneys for the defendant to file a written request for oral arguments, if oral arguments were desired.

On July 23, 2010, Flowers' attorneys filed a Supplementation of Motion for JNOV or in the Alternative for a New Trial in Response to Order of June 30, 2010. In the supplementation, the defense provided written argument in support of the Motion for J.N.O.V. or in the Alternative for a New Trial. Additionally, Flowers' attorneys stated that oral arguments cannot be made since the request for the trial transcript was denied.

A hearing on a motion for a new trial is discretionary. *Jordan v. State*, 786 So.2d 987, 1021 (Miss. 2001). Here, the defendant filed a supplementation of his motion, that, including exhibits, is thirty-seven (37) pages in length. He has thoroughly argued in the supplementation the reasons that he believes entitles him to a new trial. Additionally, he is not requesting oral arguments. For these reasons and because of the extensive notes taken by the undersigned judge during the trial, this court will rule on the Motion for J.N.O.V. or in the Alternative for a New Trial, without hearing oral arguments.

Flowers has listed forty-four (44) reasons that he believes entitles him to a JNOV or alternatively, a new trial. For the purpose of this motion, this court has consolidated those into twenty-four (24) issues. This court will now consider those issues.

1. Weight and Sufficiency of Evidence

The defendant claims that he is entitled to a new trial because the verdicts were against the weight of the evidence. Additionally, he contends that he is

entitled to a JNOV because the evidence was insufficient to support his convictions and death sentences.

A trial court's review of whether a new trial should be granted is based on the following:

> A defendant is entitled to have the trial court consider a claim that a miscarriage of justice has occurred in his case because the guilty verdict is against the weight of the credible evidence. Procedurally, this challenge takes the form of a motion for new trial . . . The trial court, in deciding the issue, is charged to consider all of the evidence in the light most favorable to upholding the verdict *Jones v. State*, 635 So.2d 884, 887 (Miss. 1994). Only if the court is convinced that, even viewing the evidence in the light most favorably to the State, a manifest injustice has occurred is the defendant entitled to a new trial. *Fairchild v. State*, 459 So.2d 793, 798 (Miss. 1984).

*McNeal v. State*, 757 So.2d 1096 (Miss.App. 2000).

As to the sufficiency of the evidence: "In order to be sufficient to sustain a conviction, the evidence must show beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction." *Carr v. State*, 208 So.2d 886, 889 (Miss. 1968). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. *Dilworth v. State*, 909 So. 2d 731, 736 (Miss. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

This court, having heard all the evidence that was presented against the defendant at trial, finds that there is sufficient evidence to support his convictions. Additionally, this court finds that Flowers' convictions are not against the weight of the evidence. Consequently, this court finds that the defendant is not entitled to a JNOV or a new trial on the grounds that the verdicts are against the weight or sufficiency of the evidence.

2. Rulings on Objections

The defendant claims that he is entitled to a new trial because this court erred in denying his pre-trial and trial motions and objections and in ruling favorably on motions and objections made by the prosecution. He also contends that this court erred in sustaining the objections made by the State during voir dire and at the guilt and sentencing phase of the trial. Additionally, he asserts that this court erred in ruling favorably on motions that were made by the State.

This court, having considered the issues concerning motions and objections, finds that the defendant has failed to state with any particularity or detail the rulings from the court on which he takes exception. However, this court carefully considered all of the motions and objections that were made by both the

prosecution and defense and ruled on such in accordance with the Mississippi Rules of Evidence and the decisions of the state and federal appellate courts. Consequently, this court finds that the defendant is not entitled to a new trial based on the rulings of this court to motions or objections made pre-trial or during the trial.

3. Failing to Quash Venire

When voir dire began on June 7, 2010, the venire makeup consisted of 89 jurors of the Caucasian race and 67 jurors of the African American race. On June 10, 2010, after conducting a group voir dire, individual voir dire of a sufficient number of jurors from which to impanel a jury, and after excusing various venire members for cause, the defendant moved this court to quash the jury panel and declare a mistrial. He sought a mistrial because in his view the jury did not have a sufficient number of African Americans on the panel after excusing members of the venire for cause. That motion was denied. He also argued at trial and in his present motion, that he is not required to choose between his right to be tried in the county where the crimes occurred and his right to a fair and impartial jury. He asserts that the proper remedy would be to discharge him until such time as a fair and impartial jury could be impaneled. Flowers now contends that he is entitled to a new trial because this court failed to quash the venire and discharge him from custody.

After several days of voir dire, numerous individuals, both black and white, were excused from the venire for cause. Because Flowers is claiming that an insufficient number of members of his own race remained on the venire, after voir dire, this court feels that it would be appropriate to review the reasons why various members of the African American race were excused for cause.

> Juror 6 was excused for cause because he knew the Flowers family and said he could not be fair and impartial.
>
> Juror 15 was excused for cause because she has known Curtis Flowers all her life and said she could not be fair and impartial.
>
> Juror 16 was excused for cause because he knows Curtis Flowers, worked in the past with Flowers' sister Priscilla, and said she could not be fair and impartial.
>
> Juror 21 was excused for cause because his wife is a cousin to Curtis Flowers and because of that, he said that he could not be fair and impartial.
>
> Juror 23 was excused for cause because he is related to Curtis Flowers and said that he could not be fair and impartial.
>
> Juror 24 was excused for cause because she said she knew Curtis Flowers and could not be fair and impartial.

Juror 31 was excused for cause because [sic] is the sister-in-law of Curtis Flowers, and could not be fair and impartial.

Juror 33 was excused for cause because his daughter and the brother of Curtis Flowers have a child together and he said that he could not be fair and impartial.

Juror 34 was excused for cause because he stated that he could not judge anyone for any reason.

Juror 36, was excused for cause because he stated that he was married to a cousin of Curtis Flowers and that he could not be fair and impartial.

Juror 37 was excused for cause because she stated that she was related to Curtis Flowers and could not be fair and impartial.

Juror 41, was excused for cause because she said that she could not sit in judgment of anyone. Additionally, she was related to murder victim, Robert Golden.

Juror 43, was excused for cause because she knows Curtis Flowers, has worked with his sister, and said that she could not be fair and impartial.

Juror 46, was excused for cause because he was a cousin to Curtis Flowers, works with Flowers' brother and sister, and stated that he could not be fair and impartial.

Juror 49, was excused for cause because he stated that he could not sit in judgment of anyone.

Juror 52, was excused for cause because he is related to Curtis Flowers and said that he could not be fair and impartial.

Juror 57, was excused for cause because he stated that under no circumstances could he consider the death penalty.

Juror 60, was excused for cause because he stated that he could not be fair and impartial since his son had recently been convicted of a felony crime.

Juror 65, was excused for cause because she stated that under no circumstances could she consider the death penalty.

Juror 70, was excused for cause because she knew the parents of Curtis Flowers, works with his sister, and stated that she could not be fair and impartial.

Juror 71, was excused for cause because she stated that she had known Curtis Flowers for many years and could not be fair and impartial.

Juror 74, was excused for cause because he stated that he knew the parents of Curtis Flowers, works with his brother Archie, Jr., and stated that he could not be fair and impartial.

Jurors 85, 86, 88, 90, 92, 95, 98, 102, 104, 109, 112, 113, 114, 116, 118, 127, 131, 133, 134, 140,

> 144, 150, 153, 154, 155, 156, African American members of the juror venire were also excused for cause for various reasons, mostly either for kinship or friendship with the Flowers family or because they could not consider the death penalty. However, none of these individuals would have ended up serving on the panel since the last individual selected to serve was juror 78. Therefore, this court sees no reason to individually list the specific reasons as to why these venire members were excused. Additionally, Juror 96 was excused due to the death of her grandfather.

The State of Mississippi exercised peremptory strikes on jurors 14, 44, 45, 53, and 62. Those strikes will be discussed further in a later section of this opinion. The jury, that ultimately heard the case, was composed of eleven Caucasians and one African American with two Caucasian alternate jurors and one African American alternate juror.

In *Le v. State*, 913 So2d. 913, 924 (Miss. 2005), the court held that since the jury was drawn by computer, in accordance with law, from the voter rolls, it represented a fair cross-section of the community, even though it did not include Asians. Here, on April 20, 2010, the jury venire was drawn in open court and in accordance with law. It therefore, represented a fair cross section of Montgomery County, Mississippi.

The proper remedy, for a criminal defendant that is concerned about whether he can receive a fair trial in the county where the crime was committed, is

to seek a change of venue, not a discharge from custody. See Mississippi Code Annotated § 99-15-35, and *Hoops v. State*, 681 So.2d 521, 525 (Miss. 1996). On two previous occasions, Flowers sought and was granted changes of venue. He chose not to seek one again. Flowers certainly had the constitutional right to be tried in the county where the crimes were committed. However, he should not be heard to complain about the racial makeup of the jury, since the overwhelming majority of the members of his race stated that they could not sit in judgment of him because of kinships, friendships, and family ties.

It is clear from the record that most of the African Americans, that were excused for cause, were excused because they were either related to Curtis Flowers or were friends with him or with various members of his family. However, that is not a sufficient reason for the venire to be quashed. The jury that was drawn represented a fair cross-section of Montgomery County, Mississippi. Additionally, given the prominence of the Flowers family in Montgomery County and given their large extended family, it is far from certain that another venire would have resulted in more African Americans serving on the jury.[1] A criminal defendant is entitled to have a venire that is representative of the cross-section of the community. In the context of the right to a trial by a jury of one's peers – one's peers are

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[1] This court will take judicial notice that in the trial that occurred in September, 2008, which resulted in a mistrial, there were two African Americans on the jury, and one African American was an alternate juror.

not determined by one's race. *Pitchford v. State*, 2010 WL 2521745 * 6 (Miss. June 24, 2010). Here, the jury that was drawn, was drawn in accordance with law, and thus, was representative of the community. The linchpin, in determining if a venire should be quashed, is whether the members of the venire state that they can be fair and impartial if chosen. *Hughes v. State*, 983 So.2d 270, 284 (Miss. 2008). Here, all the jurors that were selected to serve, swore that they would set aside any knowledge that they had about the case, base their decision on the evidence presented, and that they would be fair and impartial. This court has been presented with nothing that would indicate that they did otherwise. Therefore, this court finds that Flowers is not entitled to a new trial due to the failure of this court to quash the venire and declare a mistrial.

4. Violation of Jury Sequestration

The defendant contends that he is entitled to a new trial because this court did not grant a mistrial, as to both the culpability and sentencing phase of the trial, due to a breach of the jury sequestration. He also claims that this court erred in refusing to conduct a full inquiry into the conduct of several venire members "who served during the voir dire process as assistants to the law enforcement providing security," and for failing to excuse those jurors. Additionally, he claims that this court erred in failing to prevent spectators from having verbal and non-verbal communication with the sitting jurors in the courtroom, during breaks, or when the jury was being transported during overnight

recesses. He also claims that this court erred in failing to grant a mistrial at the sentencing phase of the trial, due to three jurors having improper contact with a Mississippi Highway Patrol officer, and that this court should have conducted a voir dire of the jurors and a full inquiry into the matter. He also claims that Bailiff Richard Whitfield was derelict in failing to advise the court of improper contact.

The record will show that the names of six-hundred (600) individuals were drawn to serve as jurors in this case. They reported in two panels on June 4, 2010. On that day, this court questioned the prospective jurors about their legal qualifications to serve and possible exemptions that they might have that could result in being excused from jury service. On June 7, 2010 voir dire began with a venire of one-hundred-fifty-six (156) persons. A twelve (12) person jury with three (3) alternates was finally seated on June 10, 2010. The venire was not sequestered until the fifteen (15) member jury was seated. Throughout the voir dire, this court cautioned the venire that they could not discuss the case with anyone, amongst themselves, or have any contact or discussion with any potential witnesses.

One morning during the voir dire process, one of the defense counsel stated that she saw one or more of the venire engaging in conversation with a law enforcement officer that was directing traffic at the courthouse. In voir dire, defense counsel questioned these venire members about this contact. It was revealed that the brief contact with the traffic officer did

not involve any discussion about the trial or the facts of the case and that the traffic officer was not a witness in the case. This court finds that this brief contact with a law enforcement officer was not a violation of sequestration or any court rule and that the defendant suffered no prejudice from this contact. There is absolutely nothing in the record that supports the defendant's allegation that prospective jurors were assisting law enforcement. Additionally, there is nothing in the record that supports his assertion that spectators were engaged in verbal and/or non-verbal communications with the sitting jurors, during the trial, or when they were being transported to and from court. Consequently, this court finds those allegations to be without merit.

At a recess between the guilt phase and the sentencing phase of the trial, Bailiff Richard Whitfield accompanied three members of the jury, who were smokers, to the back porch of the courthouse where they were allowed a smoke break. The bailiff and smokers were accompanied by one or more Mississippi State Troopers for the purpose of insuring that the jurors were not approached by anyone.

Immediately prior to the sentencing phase of the trial, defense counsel advised the court that she believed that a breach of the jury sequestration had occurred. The defense then presented testimony from Priya Brandes, an intern working for defense counsel, who testified that during the smoke break, she overheard one of the jurors ask a state trooper to please call her boyfriend for her when the trial had concluded.

This court then called Bailiff Richard Whitfield who testified to virtually the same thing. Neither the intern nor Whitfield heard the state trooper respond in any way to the juror's request.

In *Bickcom v. State*, 286 So.2d 823 (Miss. 1973), a juror made a comment to a deputy sheriff about how the deputy was driving the bus that was transporting them to lunch. The deputy responded that he would do his best to properly drive the bus. The court held that this contact was not a violation of the jury sequestration. In *Turner v. State*, 170 So. 642 (Miss. 1936), a juror separated from the other members of the jury and accompanied a deputy sheriff to a restaurant where lunches were purchased. The court held that this incident did not justify granting the defendant a new trial holding that: "the mere possibility that a juror has been exposed to outside influences is not sufficient to vitiate a verdict." In *King v. State*, 580 So.2d 1182 (Miss. 1991), the court held that the trial judge did not err in failing to grant a mistrial, where it was shown that three members of a sequestered jury visited a motel lounge and consumed alcohol.

In *Simmons v. State*, 805 So.2d 452, 506 (Mis. 2002), the court stated that the purpose of jury sequestration is to insure a fair and impartial jury that will return a verdict beyond reproach. Here, three jurors separated from the other jurors and took a smoke break in the presence of a bailiff. One of the jurors made a comment to a state trooper who was providing security. The comment by the juror to the trooper did not concern any fact or issue concerning the case. The

state trooper was not a witness in the case and did not participate in the investigation of the murders for which the defendant was being tried. Additionally, the trooper offered no response to the juror's request. Therefore, this court finds that no violation of jury sequestration occurred, the defendant suffered no prejudice from the juror's incidental contact with the state trooper, and this court was correct in failing to declare a mistrial.

This court also finds that Bailiff Richard Whitfield was not derelict in performing his duties as bailiff. No violation of jury sequestration occurred, so there was nothing for Whitfield to report. This court finds that the inquiry into whether a violation of sequestration had occurred was sufficient and that no further inquiry was necessary. Additionally, this court will note that defense counsel did not request that this court voir dire the three jurors that were taking a smoke break about whether a violation of sequestration had occurred.

In his Supplementation of Motion for NOV or in the Alternative for a New Trial, Flowers suggests that in a post-trial hearing he might desire to call all four bailiffs, as well as the deputy sheriff directing traffic outside the courthouse. However, he did not request a hearing pursuant to the order of this court that was filed on July 2, 1010 [sic]. Consequently, this court finds that Flowers has waived any hearing on this subject by failing to request a hearing. He has also failed to make a threshold showing that the jury was subjected to improper outside influence or extraneous prejudicial information that would necessitate a post-trial hearing

on the subject. See *James v. State*, 912 So.2d 940, 950 (Miss. 2005).

Flowers also argues that he was prejudiced due to the number of law enforcement officers that were in the courtroom during the trial. Except during the interim period following the jury's finding of guilt, and before the sentencing phase of the trial, this court did not take note of the number of law enforcement officers in the courtroom. At no time during the trial did Flowers raise any objection to the number of law enforcement officers that were present in the courtroom. This court finds that Flowers has waived this issue by failing to make a contemporaneous objection to the number of law enforcement officers in the courtroom. Additionally, this court finds that Flowers suffered no prejudice from the number of law enforcement officers present in the courtroom during the trial. Due to the large number of spectators that were present throughout the trial, a strong police presence was needed for traffic control, to deter the possibility of any disruptions occurring in or outside the courtroom, and to prevent any impermissible contact with the jury. The fact that an intern working for the defense was able to sneak close enough to a juror to overhear a comment, confirms that uniformed officers were needed to insure that no improper contact was made with any jurors.

5. Intimidation of Visitors and Spectators

On the third day of voir dire, under the guise of introducing the interns helping defense counsel, one of

the defense attorneys made the allegation that one of the interns had been stopped by a Montgomery County Deputy Sheriff as she exited Interstate 55 and entered the City of Winona. Defense counsel then implied that the intern was stopped because she was African American. This court allowed defense counsel to make a proffer on the subject. The defendant now claims that this court erred in failing to conduct an inquiry into this alleged incident.

This court found the story to be patently unbelievable since all the deputy sheriffs for Montgomery County were at the courthouse providing security and helping with traffic control, and also because the sheriff's department does not patrol the city streets in Winona. Additionally, this court has no investigative arm that would have allowed it to launch its own investigation concerning the allegation. If the incident did occur, it was not something that was subject to the control of the court since the alleged stop occurred several miles from the courthouse. Further, this court finds that if the incident occurred, it was a collateral matter that had no bearing on the defendant's trial. He is, therefore, not entitled to a new trial on this issue.

6. Pre-Trial Motions

The defendant contends that this court erred in its rulings on pre-trial motions. The motions that he listed are as follows: Defendant's Request For 9.04 Discovery and for Supplementation of Discovery Furnished to Date; Motion to Bar Retrial Under the

Double Jeopardy Clause of the Mississippi Constitution; Supplemental Motion to Preclude Death Penalty Procedures; Motion for Setting Reasonable Bail; Defendant's Supplemental Motion to Preclude Introduction of Victim-Impact Evidence; Supplemental and Renewed Motion to Suppress in and Out of Court Identification and for Other Relief; Notice and Renewal and Adoption of Motions From the Previous Five Trials; Motion to Preclude "Death Qualification" of Jurors or in the Alternative to Preclude the Imposition of the Death Penalty; Motion to Bar the Prosecution From Exercising Peremptory Strikes at All, or at Least From Exercising Them Against Non-White Venire Members, During Jury Selection or in the Alternative to Bar the Seeking or Imposition of the Death Penalty in the Event of Conviction; Motion to Preclude Persons Who Have Previously Served as Jury Bailiffs From Serving as Such in the Present Trial; Defendant's Renewal of, and Request for Hearing on, Motion to Determine Admissibility of Testimony From Expert on Eyewitness Identification; and the Motion to Bar the Death Penalty Based on Prosecutor Vindictiveness and Misconduct.

On April 20, 2010, this court conducted a pre-trial hearing on the following motions: Request for 9.04 Discovery and for Supplementation of Discovery Furnished to Date; Motion to Bar Retrial Under the Double Jeopardy Clause of the Mississippi Constitution; Motion to Preclude Death Penalty Procedures; Motion for Setting Reasonable Bail; and Notice of

Renewal and Adoption of Motions From the Previous Five Trials.

At a pre-trial hearing conducted on September 12, 2008, which was prior to the trial that commenced on September 22, 2008, and the only other trial in this matter in which the undersigned judge presided, this court held a hearing and considered the following motions: Motion to Preclude "Death Qualification" of Jurors or in the Alternative to Preclude the Imposition of the Death Penalty; Motion to Bar the Prosecution From Exercising Peremptory Strikes at All, or at Least From Exercising Them Against Non-White Venire Members, During Jury Selection or in the Alternative to Bar the Seeking or Imposition of the Death Penalty in the Event of Conviction; Motion to Preclude Persons Who Have Previously Served as Jury Bailiffs From Serving as Such in the Present Trial; Defendant's Renewal of, and Request for Hearing on, Motion to Determine Admissibility of Testimony From Expert of Eyewitness Identification; and a Motion to Bar the Death Penalty Based on Prosecutor Vindictiveness and Misconduct. These motions were renewed at the hearing on April 20, 2010, and at that time, this court reaffirmed its prior rulings on those motions.

This court finds that it correctly ruled on the pretrial motions that were heard on September 12, 2008 and on April 20, 2010. Therefore, this court finds that the defendant is not entitled to a new trial based on the court's rulings on these motions.

7. Recusal of Trial Judge

The defendant contends that he is entitled to a new trial due to the failure of the trial judge to recuse himself from the trial of this matter in motions filed pre-trial, at the motion hearings on April 20, 2010, and during the trial. He further contends that the trial judge was biased against him based on the rulings that were made during the trial, disparaging remarks and disparate treatment of defense counsel and defense witnesses, and this court's interruption of his presentation of mitigation evidence.

Flowers filed a motion on November 8, 2008, seeking to have the undersigned judge recuse himself from presiding over his trial. That motion was denied by this court and the defendant appealed this court's denial of the motion to recuse to the Mississippi Supreme Court. The Mississippi Supreme Court affirmed this court's denial of the recusal motion. At a pre-trial hearing on April 20, 2010, and during the trial, Flowers again sought recusal. Those motions were denied by the court.

A judge is required to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality. *Hunter v. State*, 684 So.2d 625, 630 (Miss. 1996), *Rutland v. Pridgen*, 493 So.2d 952, 954 (Miss. 1986), *King v. State*, 821 S0.2d [sic] 864, 868 (Miss.App 2002). To overcome the presumption that a judge is qualified and unbiased, the movant seeking disqualification must show beyond a reasonable doubt that the judge was biased or not

qualified. *White v. Yellow Fright* [sic] *System, Inc.*, 905 So.2d 506, 515 (Miss. 2004), *Neal v. State*, 687 So.2d 1180, 1185 (Miss. 1996).

Here, the fact that this court ruled in favor of the State of Mississippi and against the defendant on various motions is certainly no evidence of judicial bias. The fact that the jury took a recess during the presentation of mitigation evidence is also no evidence of judicial bias. Various recesses were taken throughout the trial, during the presentation of evidence by both the prosecution and the defense. On certain occasions this court may have chastised defense counsel, just as it did the prosecution, but this court dealt evenhandedly with the prosecution, the defense, and the witnesses for the respective sides. Therefore, there is no merit to Flower's claim that the undersigned judge should have recused himself from this case, and he is not entitled to a new trial on this issue.

7. [sic] Double Jeopardy Under the Mississippi Constitution

The defendant argues that his conviction should be set aside and the charges against him dismissed because his trial should have been barred by the double jeopardy clause of the Mississippi Constitution. The trial conducted in June, 2010 was Flowers' sixth trial. In the first and second trial, Flowers was indicted and convicted on one count of Capital Murder. Those convictions were reversed by the Mississippi Supreme Court. See *Flowers v. State*, 773 So.2d 309 (Miss. 2000),

and *Flowers v. State*, 842 So.2d 53 (Miss. 2003). In the third trial, the four charges of Capital Murder were consolidated and Flowers was convicted on all four counts. Those convictions were also reversed by the Mississippi Supreme Court. See *Flowers v. State*, 947 So.2d 910 (Miss. 2007). The fourth and fifth trials resulted in mistrials due to the inability of the jury to reach a verdict. Flowers argues that his sixth trial should have been barred due to prosecutorial misconduct that occurred in the five previous trials.

This court is confident that had Flowers' fourth trial been barred, the Mississippi Supreme Court would have reversed and rendered his third conviction. Flowers claims that in his fourth trial, the prosecution elicited false testimony from Melissa Schoene concerning the color of Doyle Simpson's car, an automobile from which a gun had been stolen the morning of the murders. If Schoene did testify incorrectly about the color of the automobile in the fourth trial, this court finds that it was an immaterial matter, since there was never any dispute about the automobile in question belonging to Doyle Simpson. This court will also note that this issue was so insignificant that defense counsel never questioned Schoene about whether, at a previous trial, she had testified untruthfully about the color of the automobile. In fact, instead of attempting to impeach her testimony, defense counsel actually complimented Schoene on the thoroughness of her investigation of the crime scene. This court finds that no proof has been offered to show that the prosecuted [sic] attempted to elicited or attempted to elicit false

testimony from Schoene during Flowers' fourth trial. Therefore, there was nothing about the fourth trial that would have stood as a bar to his most recent trial.

Following Flowers' fifth trial, the Montgomery County Grand Jury indicted two individuals that served as jurors in the fifth trial, for perjury. They were indicted for not giving truthful answers to questions propounded to them during voir dire. The individuals indicted were Juror James Bibbs, and Alternate Juror, Mary Purnell. Purnell eventually entered a plea of guilty and was sentenced to serve a term of incarceration. The charges against Bibbs were eventually dismissed, without prejudice. Flowers contends that the prosecution of the jurors, following the fifth trial, constituted prosecutorial misconduct which should have barred the sixth trial. This court finds that prosecuting venire members, who give untruthful answers during voir dire, does not constitute prosecutorial misconduct. Consequently, the sixth trial was not barred due to prosecutorial misconduct in the fifth trial.

Jeopardy attaches only in the event of a not guilty verdict. A reversal of a previous conviction does not bar a retrial on the same charge. Thus, Flowers' first three convictions were reversed and remanded, not reversed and rendered. A mistrial represents a nullity and stands as no bar to continued prosecution. *Pierre v. State*, 607 So.2d 43, 48 (Miss. 1992). This court will also note that in *Pierre*, the defendant was convicted in her sixth trial, the previous five trials having resulted in mistrials. Here, there were only two mistrials.

For the reasons stated herein and for the reasons stated at the pre-trial hearing conducted on April 20, 2010, this court finds no merit to the defendant's claim that his trial was barred by the double jeopardy clause of the Mississippi Constitution.

8. [sic] Identification Testimony

The defendant argues that he is entitled to a new trial because this court erred when it allowed prosecution witnesses, Katherine Snow and Pork Collins, to make an in court identification of the defendant. Flowers contends that their out of court identification was based on an out of court police photo lineup that was unduly suggestive. He also claims that this court erred when it refused to allow Patricia Jackson and Robert Johnson to offer expert opinions as to the suggestiveness of the photo lineup.

A photographic line is impermissibly suggestive when the accused is conspicuously singled out in some manner from others in the lineup. *Brown v. State*, 829 So.2d 93, 102 (Miss. 2002). At a pre-trial hearing, this court concluded that the photo lineup was not unduly suggestive. For the reasons stated at the pre-trial hearing, this court reaffirms the conclusion that the photo lineup was not unduly suggestive and finds that Flowers is not entitled to a new trial.

The defendant proffered the testimony of Patricia Jackson who was offered as an expert in the field of police lineups. Her proffered testimony was that the photo lineups, that were shown to Collins and Snow,

were unduly suggestive. This court, at a pre-trial hearing found that there was no area of expertise concerning photo police lineups and that if there was such a field, Jackson exhibited no expertise in that field. During the trial, the defense also sought to offer the testimony of Robert Johnson concerning the photo lineups. However, Johnson testified that he did not have sufficient information about the lineup to offer an expert opinion.

This court finds that it correctly denied the proffered testimony of Patricia Johnson since she clearly had no expertise in the area of police photo lineups. Additionally, this court finds that both Katherine Snow and Porky Collins were vigorously cross examined by the defense about their out of court identification of Flowers. Thus, if there was an area of expertise concerning police photo lineups, an expert in that field would have been of no assistance to the jury. Consequently, Flowers is not entitled to a new trial based on the ruling of this court that denied expert testimony on the issue.

9. [sic] Gunshot Residue

Flowers contends that he is entitled to a new trial because this court erred when it allowed testimony that gunshot residue was found on his hand the day of the murders. This court considered the testimony of both David Balash and Joe Andrews, who testified that gunshot residue consists of lead, barium, and antimony in a spherical shape and that this combination is

not found anywhere else. This court finds that all the scientific data supports that conclusion.

The issue of how the gunshot residue came to rest on Flowers' hand is not a scientific question. That was a question of fact for the jury to determine. Flowers cross examined Andrews and other witnesses about the possibility that the gunshot residue was on his hand for reasons other than from having discharged a weapon. Thus, this court finds that it was correct in allowing Joe Andrews to testify that gunshot residue was found on Flowers' hand the day of the murders.

10. [sic] Limiting Voir Dire
Questions on Racial Prejudice

The defendant argues that he is entitled to a new trial because this court limited voir dire questions on the issue of racial prejudice. However, no such questions were propounded and this court made no rulings concerning such questions. Therefore, this court finds this issue to be without merit.

11. [sic] Limiting Voir Dire on
the Death Penalty and Mitigation

The defendant argues that he is entitled to a new trial because this court erred in limiting his voir dire questions on the death penalty and on mitigation.

The only limits this court placed on voir dire, concerning these subjects, is when this court did not allow defense counsel to question individual members of the

venire concerning their personal definition and opinion of what they thought were appropriate mitigators and when defense counsel engaged in repetitive questioning of members of the venire. These limitations were appropriate. See *Pitchford v. State*, 2010 WL 2521745 * 7 (Miss. June 24, 2010), *Ross v. State*, 954 So.2d 968 (Miss. 2007). Accordingly, Flowers is not entitled to a new trial on this issue.

12. [sic] Death Qualification of Jurors

Flowers contends that this court erred when it excused for cause various jurors who stated during voir dire that they could not consider imposing the death penalty. This court finds that it acted properly when it allowed members of the venire to be struck for cause, who stated that they could not consider the imposition of the death penalty. See *Grayson v. State*, 806 So.2d 241, 254 (Miss. 2001). Therefore, Flowers is not entitled to a new trial on this issue.

13. [sic] Improper Re-Voir Dire of Jurors

The defendant argues that he is entitled to a new trial because this court acted improperly when it conducted a re-voir dire of members of the venire who expressed an ability to consider both life without parole and the death penalty as possible sentences.

The record will show that this court conducted a re-voir dire only of those venire members who gave such confusing and inconsistent answers that re-voir

dire was necessary in order for this court and counsel for both sides to understand whether they could consider the death penalty. "A juror's position on the death penalty must be unmistakably clear, or a trial judge may properly remove them for cause." *Brown v. State*, 890 So.2d 901, 910 (Miss. 2004) Here, due to ambiguous responses from members of the venire, as to whether they could consider imposition of the death penalty, it was appropriate for this court to conduct a re-voir dire on this issue. See *Pitchford v. State*, 2010 WL 2521745 * 6 (Miss. June 24, 2010). Accordingly, Flowers is not entitled to a new trial on this issue.

14. [sic] Failure to Strike Jurors for Cause

Flowers argues that he is entitled to a new trial because this court failed to strike jurors 3, 17, 40, 51, 54, 67, 69, 72, 75, 107, 111, 120, 124, and 126 for cause. The record will show that of this group, only juror # 3 served on the jury. Juror #75 was selected to serve as an alternate juror, but was excused from the jury on June 12, 2010 due to the illness of her sister. The record will also show that the defendant only used eight peremptory strikes and, therefore, cannot complain about this court's failure to strike juror #3, since he had a strike available to use and failed to exercise the strike. See *Evans v. State*, 725 So. 2d 613, 652 (Miss. 1997).

Flowers further asserts that this court's failure to strike the above listed jurors, caused him to have to use peremptory strikes on them and forced him to accept jurors who were tainted by bias and prejudice.

This court saw no evidence that any of the jurors that were selected were tainted by bias and prejudice. Additionally, the jurors that Flowers believed should be stricken for cause all indicated that they could be fair and impartial, that they would lay aside any knowledge or opinion that they had about the case, and base their decision strictly on the evidence presented. This court had an opportunity to observe their demeanor and body language and found their answers to be sincere. This court will also note that several jurors were struck for cause even though they expressed an ability to be fair and impartial.

This court will again note that Flowers had four peremptory challenges available to him that he did not use. If he was concerned about not having a sufficient number of peremptory strikes available, he should have requested additional strikes. See *Mhoon v. State*, 464 So.2d 77, 81 (Miss. 1985). That he did not do. A prerequisite for appeal of a trial court's refusal to sustain challenges for cause is showing that peremptory challenges were exhausted and incompetent jurors were forced upon the defendant. *Christmas v. State*, 10 So.3d 413, 423 (Miss. 2009), *Chisolm v. State*, 529 So.2d 635, 639 (Miss. 1988). Here, Flowers neither exhausted his peremptory challenges nor did he request additional peremptory challenges. Thus, he is not entitled to a new trial on his claim that this court erred in failing to strike for cause jurors 3, 17, 40, 51, 54, 67, 69, 72, 75, 107, 111, 120, 124, and 126.

15. [sic] Peremptory Strikes of the Prosecution

The defendant argues that the peremptory strikes of the prosecution were in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). He further argues that this court erred when it denied him the use of a rough draft copy of the transcript of voir dire, and also in denying him a recess to allow him to attempt to rebut the race neutral reasons offered in defense of the peremptory strikes made by the prosecution.

The record will show that the State of Mississippi exercised six peremptory strikes. Five of those peremptory strikes were used to strike African Americans. Consequently, this court required the prosecution to offer race neutral reasons for the strikes that were used. The race neutral reasons offered by the State are as follows:

> Juror 14, an African American female was struck because she had worked in the past with Archie Flowers, the father of Curtis Flowers. Additionally, she had been sued in the past by the Tardy Furniture Store.
>
> Juror 44, an African. American female was struck because she indicated that she was not sure whether she could consider the death penalty. Additionally, she stated that she worked in the same factory with one of the defendant's sisters, but claimed to have no contact with her. However, a manager from the factory, stated under oath, that this juror

worked on the same factory line as Flowers' sister, about nine inches from her.

Juror 45, an African American female was struck because she first stated that she could not judge anyone. She later changed her mind and said that she could judge. Additionally, she had been sued in the past by the Tardy Furniture Store.

Juror 53, an African American female stated that her nephew is married to a sister of Curtis Flowers. Also, her brother-in-law is married to Curtis Flowers' aunt. On her questionnaire, she stated that she could not under any circumstances consider the imposition of the death penalty. During voir dire, she stated that she had lied on her questionnaire when she stated that she could not consider the death penalty because she did not want to serve on the jury. She was also late to court on the second day of voir dire.

Juror 59, a white female was struck because she stated that she would lean toward imposing a sentence of life without parole instead of the death penalty.

Juror 62, an African American female stated that in the past she had worked with Archie Flowers, the father of Curtis Flowers. She also stated that she had worked in the past with Lola Flowers, a sister to Curtis Flowers. She stated that she could possibly lean towards the Flowers family in the trial.

The defendant attempted to rebut some of the race neutral strikes offered by the prosecution. More specifically, the defense tried to rebut the strikes of jurors 14 and 44 by arguing that the prosecution tendered juror 17, even though she knew Archie Flowers and other members of the Flowers family. However, this court found that a bank teller, who waits on customers at a bank, is substantially different from working at the same business establishment with members of the defendant's family. It was also abundantly clear that juror 17 had a much closer relationship with members of the victims families that [sic] she had with anyone in Flowers' family. In fact, this was of such a concern to Flowers that he sought to have this court strike juror 17 from the venire for cause. This court will also note that the prosecution did not strike juror 8, an African American male, even though he knew Archie Flowers, Jr. from the Auto Zone store. It was evident to this court that the prosecution utilized peremptory strikes only against those individuals who actually worked with, or who in the past had worked with, members of Flowers' family.

The defense also tried to rebut the strike of juror 53, by arguing that the State tendered juror 51, even though he had not originally been forthcoming about the fact that he had heard about the case from being in a previous venire. However, this court found that Flowers failed to rebut the strike of juror 53, because juror 53 stated that she intentionally lied on her questionnaire, while there was nothing to indicate that juror 51 had intentionally been untruthful. Ultimately,

this court found that the State offered race neutral reasons for all of the peremptory strikes utilized by the prosecution and that the defense failed to rebut those reasons.

In *Flowers v. State*, 947 So.2d 910, 923 (Miss. 2007), the court held that the fact that a juror had worked in the past with Flowers' sister was a race neutral reason for the strike. However, the court found disparate treatment between a black juror and a white juror, who had a family member that worked with Flowers' father, and, therefore, found the race neutral reason offered by the prosecution to be pretextual. Here, however, there is no disparate treatment. Every member of the jury that worked with or had in the past worked with members of the Flowers family were peremptorily struck by the prosecution.

Being acquainted with family members of a defendant have been found to be race neutral. *Manning v. State*, 735 So.2d 323 (Miss. 1999); *Porter v. State*, 616 So. 2d 899, 907 (Miss 1993). A juror's reluctance to serve has been found to be a race neutral reason for a peremptory strike. *Manning* at 340; *Walker v. State*, 671 So. 2d 581 (Miss. 1995). A juror's equivocating or anti-death penalty views have also been found to be a race neutral reason for a peremptory strike. *Manning* at 340; *Mack v. State*, 650 So.2d 1289, 1300 (Miss. 1994). Being late for court is a valid race neutral reason for the use of a peremptory strike. *Lockett v. State*, 517 So. 2d 1346 1357 (Miss. 1987). The inability to sit in judgment of another person has also been found to

be a race neutral reason for a peremptory strike. *Caston v. State*, 823 So. 2d 473, 500 (Miss. 2002).

Here, the race neutral reasons offered by the State in support of the peremptory challenges utilized by the prosecution are clear in the record. Most of the race neutral reasons offered by the prosecution have been found by the Mississippi Supreme Court to be valid race neutral reasons supporting peremptory strikes. This court also finds that due to the facts peculiar to this case, the fact that jurors had been sued in the past by the Tardy Furniture was a valid race neutral reason for striking them.[2] The prosecution offered multiple reasons for peremptorily striking each of the African Americans that were struck. At trial, this court found the reasons offered by the State to be valid race neutral strikes. This court found that the defense failed to rebut the race neutral strikes reasons offered by the prosecution since the State tendered no Caucasian jurors that had similar issues to those of the African American jurors that were peremptorily struck. This court now reaffirms those findings.

In his supplementation to the motion for JNOV, or new trial, Flowers argues that this court should withhold ruling on the motion until such time as the trial transcript is prepared, in order to allow him to review the record in an attempt to post-trial rebut the race

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[2] One of the victims was Bertha Tardy, the owner of the store. The murders occurred at the Tardy Furniture Store. In cross examination of Clemmie Fleming, the defense implied that the Tardy Furniture Store had forgiven her debt in exchange for her testimony.

neutral reasons offered by the prosecution in support of their peremptory strikes. "However, the proper test is measuring what was known when the *Batson* decision was first made, during the jury-selection process, and for purposes of this opinion, the post-trial reasoning is disregarded." *Booker v. State*, 5 So. 3d 356 (Miss. 2008). Therefore, the defendant is bound by the rebuttal reasons that were offered at trial and not from a post-trial review of the transcript. Consequently, waiting until the trial transcript is prepared before ruling on this issue would be of no benefit to Flowers.

Flowers also contends that this court erred when it did not provide him with a rough draft of the court reporter's transcript of voir dire. The record will show that in order to make a determination of whether certain jurors should be excused for cause, this court had the court reporter prepare a rough draft transcript of her notes on those limited jurors. However, a complete transcript of the voir dire was not prepared. The record will also show that this court did not utilize the court reporter's notes in making its findings that the reasons offered by the State in support of the peremptory strikes were race neutral. A recess of several days in length would have been required in order for a complete transcript of three and one-half days of voir dire to have been prepared. This court finds that Flowers suffered no harm in this court's denial of his request of a transcript of voir dire. See *Howell v. State*, 860 So.2d 704 (Miss. 2003).

Flowers also claims that this court erred when it failed to grant him an extended recess to allow him to

attempt to find reasons that would rebut the race neutral reasons offered by the State, in support of the peremptory strikes that were utilized. This court will note that following voir dire, this court granted more time for the defense counsel to review notes taken during voir dire, than was originally requested. Flowers was represented by two attorneys, with numerous interns and defense staff members assisting with the case. This court finds that he had ample time and staff to review voir dire notes to determine whether the race neutral reasons offered by the State were pretextual. Consequently, this court finds that it did not err in failing to grant an extended recess to the defendant to allow him to try to find reasons to rebut the race neutral reasons offered by the State.

16. [sic] Testimony of Odell Hallmon

The defendant argues that the testimony of Odell Hallmon should have been excluded based on a pretrial motion that was made at one of his previous trials. This court finds that Flowers waived the issue because at trial, he failed to make a contemporaneous objection to the testimony of Odell Hallmon. He also did not seek to exclude this testimony in pre-trial motions that were heard on September 12, 2008, April 20, 2010, or June 1, 2010.

17. [sic] Excluding Testimony of Robert Johnson

This court excluded the testimony of Robert Johnson who was offered as an expert witness in the field of

law enforcement, police practices, consulting, investigation, administration, communication, dispatching and training. Flowers contends that this court erred when it excluded the testimony.

When considering whether expert testimony is admissible, this court finds it appropriate to first look at the Mississippi Rules of Civil Procedure. Rule 702 of the Mississippi Rules of Civil Procedure states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

M.R.C.P. 702. In *Mississippi Transportation Commission v. McLemore*, 863 So.2d 31, 35 (Miss. 2003), the Mississippi Supreme Court held that the testimony of expert witnesses should be admitted only if the witness is qualified by virtue of his or her knowledge, skill, experience or education, and the witnesses's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue.

In determining whether expert testimony is admissible, courts must also make a determination as to

whether the testimony is reliable. The factors include whether the theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. *McLemore* at 37, citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-94 (1993).

In *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1092 (Miss. 2005), the Mississippi Supreme Court held that if a witness is testifying about subjects that require scientific, technical, or other specialized knowledge that is beyond the common knowledge of a random adult, the testimony must be treated as expert testimony.

Mr. Johnson was offered as a witness to show that the investigation into the murders was flawed. More specifically, he claimed the investigation was flawed because there was never a lead investigator and central repository of information and evidence that was gathered; that the integrity of the crime scene was not properly preserved causing the possibility of evidence contamination and the overlooking of evidence; that evidence was not properly documented; and that the investigation focused too early on one suspect.

In his proffered testimony, Johnson stated that there were commonly accepted investigative standards throughout most of the country. However, he never

articulated what they were. He even went so far as to say that if something is not documented, it did not happen. He stated that there are no minimum standards for police investigations in Mississippi and, therefore, was unable to say that the investigation of the Tardy murders fell below minimum standards for police procedures and protocols in Mississippi.

In *Ross v. State*, 954 So.2d 968, 997 (Miss. 2007), the court held that the testimony of an expert in the field of police investigatory techniques must meet the standards required under *Daubers* and *McLemore*. This court will note that during the trial, this court heard testimony from experts in the field of ballistics, pathology, fingerprints, shoe print identification, gunshot residue identification, and trace evidence. In each of those fields, a properly trained expert could analyze the evidence gathered and reach the same or a similar conclusion as any other expert. In the field of criminal investigations, there are no established investigatory techniques that, if followed, will lead to the same result. If so, then every police department would have a manual that, if followed, would lead to the arrest and conviction of all criminal perpetrators. However, that is not the case, because no two crimes are the same and, thus, no two criminal investigations are the same. Because there is no valid way of testing the science of crime scene investigations, this court found and now reaffirms that Johnson's proffered testimony failed to meet the reliability standard required under Rule 702.

This court will also note that every law enforcement officer that testified at the trial, as a prosecution

witness, admitted that he or she could and maybe should have done something differently. The defense called as defense witnesses James Taylor Williams, Liz Van Horne, Wayne Miller, and John Johnson, all of whom were law enforcement officers that played a role in investigating the crimes. They were called for the specific purpose of showing deficiencies in the investigation. Thus, this court found and reaffirms that even if Johnson's proffered testimony met the reliability standards of Rule 702, it would be cumulative in nature and would not assist the jury. *Ross v. State*, 22 So.3d 400, 420 (Miss.App. 2009).

This court finds it ruled correctly in excluding the testimony of Robert Johnson. Therefore, the defendant is not entitled to a new trial on this issue.

18. [sic] Jury Deliberations at Guilt Phase of Trial

Flowers claims that he was denied a fair trial because the jury at the guilt phase of the trial deliberated for only twenty-eight minutes before finding him guilty. This court did not calculate the length of time the jury deliberated before reaching a verdict, but the time suggested by the defendant is definitely a close approximation. However, there is no legal yardstick to measure the length of time a jury must deliberate before reaching a verdict. A short deliberation does not automatically demonstrate bias or prejudice. *Estate of Jones v. Phillips*, 992 So.2d 1131, 1149 (Miss. 2009).

In *Gray v. State*, 728 So.2d 36 (Miss. 1998), the jury deliberated for ten minutes before convicting the

defendant of Capital Murder. The court found that the length of deliberations before returning a verdict did not show bias or passion, and that time restrictions or guidelines regarding jury deliberations would usurp the jury system. *Gray* at 63.

Here, the jury appeared to be an attentive jury that listened carefully to the evidence. This court observed several jurors taking extensive notes throughout the trial. The fact that the jury deliberated for less time than the defendant would have preferred is not proof of a biased, prejudiced, or tainted jury. This court finds that Flowers was not denied a fair trial, and is, therefore, not entitled to a new trial on this issue.

19. [sic] Overnight Recess Between Guilt and Sentencing Phase of Trial

The defendant argues that this court erred when it failed to grant an overnight recess between the guilt and sentencing phase of his trial. Additionally, he contends that this court relinquished control of the court to a restless, hungry, inattentive, and distracted jury during the presentation of mitigation evidence by the defense. He also claims that this court improperly interrupted the presentation of mitigation evidence by recessing to allow the jury to eat.

On June 18, 2010, after the jury found Flowers guilty of four counts of Capital Murder, this court recessed for a considerable length of time before moving into the sentencing phase of the trial. A delay of just fifteen minutes between the guilt and sentencing

phase and a denial of a twenty-four hour cooling off period is not grounds for setting aside a sentence of death in a Capital Murder trial. *Howell v. State*, 860 So. 2d 704, 753 (Miss. 2003). Here, the delay between the sentencing and guilt phase of the trial was a period much longer than fifteen minutes. Additionally, Flowers has presented nothing to suggest that he was prejudiced by this court's failure to grant him an overnight recess between the end of the guilt phase and the start of the sentencing phase of his trial. Thus, he is not entitled to a new trial on this issue.

During the sentencing phase of the trial, this court sought input from the jury as to whether to recess for the evening or continue with the presentation of evidence until later in the evening.[3] The jury chose to proceed hearing testimony and requested that food be provided to them. This court adhered to the jury's wishes, food was ordered for them, and the presentation of testimony and evidence continued until the food arrived. Once food arrived for the jury, this court recessed to allow them to eat. Once the jury had eaten, the presentation of the evidence continued until the defense rested, and then the court recessed for the evening.

The defendant argues that this court improperly interrupted the presentation of his mitigation evidence. However, the record will show that throughout

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[3] This court did not keep track of the time that various events were occurring during the trial, but believes that this occurred around 7:00-7.30 p.m.

the trial, this court took recesses to allow the jury to have lunch and take rest breaks. This court finds that the recess during the presentation of mitigation evidence was no different than the other recesses that occurred throughout the trial. Also, the defendant raised no objection when this court took a recess in order to allow the jury to eat and he suffered no prejudice from the recess.

While it sounds dramatic, like something out of a John Grisham novel, to suggest that this court relinquished control of the trial to a restless, hungry, inattentive, and distracted jury, it is also as fictional as anything written in a Grisham novel. While this court honored the request of the jury to continue with the presentation of the evidence, rather than recessing for the evening, the jury was not in control of the courtroom. This court saw nothing to suggest that the jury was restless, inattentive, or distracted. The defendant is not entitled to a new trial on this issue.

20. [sic] Objections During Mitigation Testimony

The defendant claims that he is entitled to a new trial because this court erred in sustaining objections made by the prosecution during the sentencing phase of the trial. The defendant has offered no specificity or detail about the rulings on objections of which he complains. This court does recall sustaining objections to defense questions to member [sic] of Flowers' family about their desire that he be sentenced to life without parole. Such questions are not permissible and this

court, therefore, did not err in sustaining objections to those questions. *Wilcher v. State*, 697 So.2d 1087, 1104 (Miss. 1997). Evidence which does not bear on the defendant's character, prior record, or circumstances of his offense is properly excluded at the sentencing phase of a Capital Murder trial. *Stewart v. State*, 662 So.2d 552, 562 (Miss. 1995).

While this court recalls no other objections, this court carefully considered all objections that were made and ruled on such in accordance with the Mississippi Rules of Evidence and the decisions of the state and federal appellate courts. Consequently, this court finds that the defendant is not entitled to a new trial based on the rulings of this court to objections made during the sentencing phase of the trial.

21. [sic] Jury Instructions During the Culpability Phase of the Trial

The defendant contends that he is entitled to a new trial because this court denied, during the culpability phase of the trial, Instructions D-1A, D-2A, D-1C, D-1D, D-3, D-6, D-7, D-8, D-11, D-16, and D-17.

This court finds that it properly denied these instructions because they were either peremptory in nature, incorrect statements of the law, cumulative, repetitive, or not supported by the evidence. Consequently, this court finds that Flowers is not entitled to a new trial based on the failure of this court to grant those instructions.

22. [sic] Sentencing Instructions

The defendant contends that this court erred in granting Sentencing Instructions SS-1A, SS-1B-, SS-1C, and SS-1D. He also argues that this court erred when it denied defense Sentencing Instructions D-1, D-5A, D-5B, D-5C, D-5D, D-7, D-8, D-9, D-11, D-12, D-13, D-14, D-17 D-18, D-19, D-20, D-21, D-29, D-30, D-31, D-32, D-33, D-34, D-36, D-38, and D-40.

This court finds that Sentencing Instructions SS-1A, SS-1B-, SS-1C, and SS-1D are correct statements of the law and that there was no error in granting those instructions. This court finds that it properly denied Sentencing Instruction D-1, since it was peremptory in nature.

This court finds that it properly denied Sentencing Instructions D-5A, D-5B, D-5C, D-5D, since they were repetitive and cumulative in view of the fact that Sentencing Instructions SS-1A, SS-1B-, SS-1C, and SS-1D were granted.

This court finds that it properly denied Sentencing Instruction D-4. See *Brown v. State*, 890 So.2d 901, 920 (Miss. 2004).

This court finds that Sentencing Instruction D-7, was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B-, SS-1C, and SS-1D were granted.

This court finds that Sentencing Instruction D-8 was properly denied since it was repetitive and

cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B-, SS-1C, SS-1D, and SS-5 were granted.

This court finds that Sentencing Instruction D-9 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B-, SS-1C, SS-1D, and SS-5 were granted.

This court finds that Sentencing Instruction D-11 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-5, SS-6, and D-37 were granted.

This court finds that it properly denied Sentencing Instruction D-12. See *King v. State*, 960 So.2d 413, 466 (Miss. 2007), and *Lynch v. State*, 877 So.2d 1254, 1268 (Miss. 2001).

This court finds that Sentencing Instruction D-13 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B, SS-1C, SS-1D, SS-5, and D-37 were granted.

This court finds that Sentencing Instruction D-14 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-6 and D-37 were granted.

This court finds that Sentencing Instruction D-17 was properly denied since it was unnecessary in view of the fact that this court granted Sentencing Instructions SS-1A, SS-1B, SS-1C, and SS-1D.

This court finds that Sentencing Instruction D-18 was properly denied in view of the fact that this court correctly instructed the jury on the law by granting Sentencing Instructions SS-1A, SS-1B, SS-1C, and SS-1D.

This court finds that Sentencing Instruction D-19 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B, SS-1C, SS-1D, and SS-4 were granted.

This court finds that Sentencing Instruction D-20 was properly denied since it was repetitive and cumulative in nature in view of the fact that Sentencing Instructions SS-1A, SS-1B, SS-1C, SS-1D, and D-31 were granted.

This court finds that Sentencing Instruction D-21 was properly denied since it was repetitive and cumulative in view of the fact that Sentencing Instruction D-24 was granted.

This court finds that it properly denied Sentencing Instruction D-29. See *Pitchford v. State*, 2010 WL 2521745 * 29 (Miss. June 24, 2010).

This court finds that it properly denied Sentencing Instruction D-30. See *King v. State*, 960 So.2d 413 (Miss. 2007), and *Holland v. State*, 705 So.2d 307, 354 (Miss. 1997).

This court finds that it properly denied Sentencing Instruction D-31. See *Branch v. State*, 882 So.2d 36, 70 (Miss. 2004).

This court finds that it properly denied Sentencing Instruction D-32. See *Hansen v. State*, 592 So.2d 114, 151 (Miss. 1991), and *Minnick v. State*, 551 So.2d 77, 95 (Miss. 1988).

This court finds that it properly denied Sentencing Instruction D-33. See *King v. State*, 920 So.2d 413, 466, and *Lynch v. State*, 877 So.2d 1254, 1268 (Miss. 2004).

This court finds that it properly denied Sentencing Instruction D-34. See *Gillett v. State*, 2010 WL 2609432, * 40 (Miss. July 1, 2010), and *Pitchford v. State*, 2010 WL 2521745 * 31-32 (Miss. June 24, 2010).

This court finds that Sentencing Instruction D-36 was properly denied since it was repetitive and cumulative in view of the fact that Sentencing Instruction SS-4 was granted.

This court finds that it properly denied Sentencing Instruction D-38. See *Gillett v. State*, 2010 WL 2609432, * 42 (Miss. July 1, 2010), and *Chamberlain v. State*, 989 So.2d 320, 342 (Miss. 2008).

This court finds that it properly denied Sentencing Instruction D-39. See *Gillett v. State*, 2010 WL 2609432, * 39 (Miss. July 1, 2010), *Manning v. State*, 735 So.2d 323, 351 (Miss. 1999).

This court finds that it properly denied Sentencing Instruction D-40. See *Gillett v. State*, 2010 WL 2609432, * 37 (Miss. July 1, 2010).

Because this court correctly instructed the jury on the law and properly excluded instructions that

were peremptory, cumulative, repetitive, unnecessary, or incorrect statements of the law, this court finds that Flowers is not entitled to a new trial on any issue involving the granting or denial of sentencing instructions.

22. [sic] Using Robbery as an Aggravating Factor

The defendant contends that this court erred in allowing the crime of robbery to be used as an aggravating factor in the sentencing instructions that were granted during the sentencing phase of the trial. This court, having considered this issue, finds that it did not err in allowing the crime of robbery to be used as an aggravating factor. See *Gillett v. State*, 2010 WL 2609432, * 34-35 (Miss. July 1, 2010), and *Ross v. State*, 954 So.2d 968, 1014 (Miss. 2007).

23. [sic] Failing to Provide DVD Player to the Jury

During the sentencing phase of the trial, the defense played a portion of a DVD that showed Curtis Flowers, and other members of a group, singing Gospel music. The DVD was played on a computer and projected onto a screen with a computer, projector, and screen that was provided by defense counsel. The defendant now contends that this court erred when it failed to provide a DVD player, so that the jury could watch the DVD during deliberations.

This court will note that the defendant did not request that this court provide a DVD player for

the jury's use during deliberations. Also, during deliberations, the jury did not ask for a DVD player to be provided to them. Therefore, this court finds that no error occurred in failing to provide a DVD player to the jury.

24. [sic] Inquiry From the Jury During the Sentencing Phase of the Trial

During the jury deliberations at the sentencing phase of the trial, the court received a written inquiry from the jury that read as follows: "If we can not agree unamiously [sic]; who will make the ultimate decision?" This court responded in writing to the jury as follows: "That is not an issue the jury should be concerned about." The defendant argues that this court erred when it responded to the jury inquiry in the manner in which it did, and that this court should instead have granted Sentencing Instruction D-34, which had previously been denied by the court.

In a preceding section of this opinion, this court found that it properly denied Sentencing Instruction D-34. This court will note that in Sentencing Instruction CS-1, the jury was instructed that if they were unable to unanimously agree on a sentence, then they should write that on the sentencing forms provided by the court. However, even if this court had never instructed the jury on what would happen if they could not agree, there, would have been no error. *Wilcher v. State*, 697 So.2d 1087, 1106 (Miss. 1997).

This court will also note that the jury was not inquiring about what they should do in the event that they could not unanimously agree on a verdict. Had that been the case, then advising them to re-read instruction CS-1 would have been appropriate. The jury was inquiring about who would sentence Flowers if they did not unanimously agree on a verdict. This court properly advised the jury that this issue was not an area of concern for them. This court responded to the jury inquiry in the only way that it could without possibly influencing the verdict of the jury. Supplemental jury instructions should not be given unless done so for the purpose of clarifying another instruction, or to cover an omission. *Payton v. State*, 897 So.2d 921, 955 (Miss. 2003). It is not advisable to give instructions to a jury once it has begun deliberations. *Haynes v. State*, 451 So.2d 227, 231 (Miss. 1984).

After the sentence of the jury was pronounced, this court individually polled each member of the jury to determine whether they agree that Flowers should suffer death. Every member of the jury affirmatively stated that they agreed with the verdict.

This court finds that it did not err in responding to the jury question, during the deliberations in the sentencing phase of the trial, in the manner in which it responded. Consequently, the defendant is not entitled to a new trial on this issue.

Conclusion

This court has carefully considered the Motion for J.N.O.V. or in the Alternative for a New Trial, that was filed by the Defendant, Curtis Giovanni Flowers, on June 28, 2010. After having carefully considered the motion, for the reasons stated herein, and for the reasons stated in the rulings from the bench pre-trial and during the trial, this court finds that the motion is not well-taken and should be denied.

A SEPARATE ORDER WILL ISSUE THIS DATE.

THIS THE 4th DAY OF AUGUST, 2010.

/s/ Joseph H. Loper, Jr.
JOSEPH H. LOPER, JR.
CIRCUIT COURT JUDGE

**Curtis Giovanni FLOWERS a/k/a Curtis Flowers a/k/a Curtis G. Flowers**

**v.**

**STATE of Mississippi**

**NO. 2010-DP-01348-SCT**

Supreme Court of Mississippi.

11/02/2017

MONTGOMERY COUNTY CIRCUIT COURT, HON. JOSEPH H. LOPER, JR., J.

ATTORNEYS FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER BY: ALISON R. STEINER, SHERI LYNN JOHNSON, KEIR M. WEYBLE

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: BRAD A. SMITH, JASON L. DAVIS

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶ 1. Curtis Giovanni Flowers was indicted on four counts of capital murder with the underlying felony of armed robbery, stemming from the 1996 murders of four employees of Tardy Furniture Store in Winona, Mississippi. Following his sixth trial, he was convicted on all four counts of capital murder and sentenced to death. The Court affirmed his convictions and death sentence in *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI*). Flowers filed a petition for a writ of certiorari with the United States Supreme Court. In *Flowers v. Mississippi*, ___ U.S. ___, 136 S.Ct.

2157, 195 L.Ed.2d 817 (2016), the Supreme Court granted Flowers's petition for a writ of certiorari, vacated the Court's judgment in *Flowers VI*, and remanded the case to the Court for further consideration in light of *Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016).

¶ 2. The Supreme Court decided *Foster* after *Flowers VI* had been decided by the Court.[1] Because the sole issue raised in *Foster* was whether the prosecution's use of peremptory strikes was racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court's order pertains to only one issue raised by Flowers in his latest appeal to the Court—the *Batson* issue. Accordingly, the remaining issues addressed by the Court in *Flowers VI* were not disturbed and the Court's opinion as to the remaining issues is reinstated as fully set out herein.

¶ 3. On remand, the Court afforded the parties an opportunity to submit supplemental briefs in light of *Foster* as directed by the Supreme Court. After review and further consideration in light of *Foster*, we discern no *Batson* violation and reinstate and affirm Flowers's convictions and death sentence.

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[1] On November 13, 2014, the Court issued its opinion in *Flowers VI*, affirming Flowers's capital murder convictions and sentence of death, with mandate issuing on April 2, 2015. On May 23, 2016, the Supreme Court issued its opinion in *Foster*.

**Factual Background and Procedural History**

¶ 4. At approximately 9:00 on the morning of July 16, 1996, Bertha Tardy, the owner of Tardy Furniture Store, called Sam Jones and asked him to come to the store to train two new employees. When Jones arrived at the store a short time later, he discovered the bodies of Bertha Tardy, Robert Golden, Carmen Rigby, and Derrick Stewart. All four victims had been shot in the head; Stewart was the only victim still alive when Jones arrived. Jones went to a nearby business and asked an employee to call the police. Johnny Hargrove, the City of Winona Police Chief, was the first law enforcement officer to arrive; he called for backup and ambulance services. Shell casings from 0.380 caliber bullets were recovered from the scene, and a bloody shoeprint was found near one of the victims.

¶ 5. Shortly after officers arrived at the scene, law enforcement officers received a call about an auto burglary at Angelica Garment Factory in Winona. Deputy Sheriff Bill Thornburg responded, and he learned that someone had burglarized Doyle Simpson's car and had stolen a 0.380 caliber pistol. Katherine Snow, an Angelica employee, placed Curtis Flowers at Simpson's car around 7:15 that morning.

¶ 6. Police interviewed Flowers around 1:30 that afternoon, and Flowers consented to a gunshot residue test. Police interviewed Flowers again two days later on July 18, 1996. Flowers claimed to have been babysitting his girlfriend's children on the morning of the murders, but he provided inconsistent statements

about his schedule. During the July 16 interview, Flowers said that he woke up around 6:30 a.m. on the day of the murders and went to his sister's house around 9:00 a.m., then went to a local store around 10:00 a.m. On July 18, Flowers said that, on the morning of the murders, he woke up around 9:30 a.m., went to his sister's house around noon, and went to the store at approximately 12:45 p.m. Flowers told investigators that he had been employed at Tardy Furniture for a few days earlier that month, but he had been fired on July 6 after he did not show up for a few days. Flowers moved to Texas in September 1996. After further investigation, Flowers was arrested and brought back to Mississippi. He was indicted on four separate counts of capital murder in March 1997.

¶ 7. Flowers was tried for the murder of Bertha Tardy in October 1997. After a change of venue from Montgomery County to Lee County, Flowers was convicted and sentenced to death. Flowers appealed and we reversed and remanded for a new trial on the ground that Flowers's right to a fair trial had been violated by admission of evidence of the other three murder victims. *Flowers v. State*, 773 So.2d 309 (Miss. 2000) (*"Flowers I"*). Flowers's second trial was for the murder of Derrick Stewart; it was held in Harrison County in March 1999. The jury returned a guilty verdict and sentenced Flowers to death. On appeal, we again reversed and remanded for a new trial. The Court held that Flowers's right to a fair trial had been violated, again, by admission of evidence of the other victims and by the prosecution arguing facts that were

not in evidence. *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*"Flowers II"*).

¶ 8. The Montgomery County Circuit Court held Flowers's third trial in 2004 and tried him for all four murders. The jury found Flowers guilty and sentenced him to death. Finding that the State had engaged in racial discrimination during jury selection, the Court once again reversed and remanded the case for a new trial. *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (*"Flowers III"*). Flowers's fourth and fifth trials also were on all four counts of capital murder. Both resulted in mistrials when the jury was unable to reach a unanimous verdict during the culpability phase. The State did not seek the death penalty in the fourth trial but did seek it in the fifth trial.

¶ 9. The circuit court conducted Flowers's sixth trial, the subject of the instant appeal, in June 2010 in Montgomery County. The State tried Flowers for all four murders. The State called twenty-one witnesses in its case-in-chief. Police Chief Johnny Hargrove was the State's first witness. Hargrove testified that police had found a bloody shoeprint at the scene. Hargrove had asked the District Attorney's Office and the Highway Patrol to help investigate the murders. Mississippi Highway Patrol Investigator Jack Matthews testified that he saw a bloody shoeprint and shell casings scattered near the bodies. Matthews testified that cash was taken from the store during the murders and that he found Flowers's time sheet and a check made out to him for $82.58 on Bertha Tardy's desk. Matthews said that, according to the documents on Bertha Tardy's

desk, the store would have had $300 cash on hand that morning. However, there was only change, no bills, in the cash drawer. During his investigation, Matthews spoke with Roxanne Ballard, Bertha Tardy's daughter, and learned that Flowers recently had been fired from his job at Tardy Furniture. Matthews testified that $235 was found hidden in Flowers's headboard after the murders. He also testified that Flowers wore a size ten-and-a-half shoe.

¶ 10. Ballard was the bookkeeper at Tardy Furniture and had worked in the store her whole life. Looking at the books from the morning of the murders, Ballard testified that the store had $400 in the cash drawer that morning. However, she confirmed Matthews's testimony that the books showed $300, but Ballard saw a receipt for a late charge in the amount of $100, so she knew the drawer had contained a total of $400. Ballard testified that $389 was missing from the cash drawer after the murders. Also, looking at pictures from the crime scene, Ballard testified that the photos showed a bank bag lying wide open on a pile of fabric swatches. She testified that the bank bag was always closed and it should have been in a drawer or on Carmen Rigby's desk.

¶ 11. Melissa Schoene, a crime scene expert with the Mississippi Crime Laboratory, testified that she took impressions of the bloody shoeprint and collected the 0.380 caliber casings. Sheriff Bill Thornburg testified that he had gone to Angelica Garment Factory on the day of the murders to investigate Doyle Simpson's stolen 0.380 caliber pistol. Thornburg testified that it

looked like a screwdriver or tire iron had been used to pry open the glove box of Simpson's car. Thornburg also went to Simpson's mother's home to collect spent 0.380 hulls from Simpson's gun. A few days after the murders, Thornburg searched the home of Connie Moore, Flowers's girlfriend. He found a size ten-and-a-half Fila Grant Hill shoebox in a dresser at Moore's house.

¶ 12. David Balash, a firearms identification expert, testified that the bullets collected from Tardy Furniture either matched the bullets or were consistent with the bullets collected from Simpson's mother's house. Joe Andrews, a forensic scientist specializing in trace evidence, testified that Flowers's gunshot residue test revealed one particle of gunshot residue on the back of Flowers's right hand. Andrews also analyzed the shoeprint found at Tardy Furniture, and he determined that the print was consistent with size ten-and-a-half Fila Grant Hill tennis shoes. Patricia Hallmon Odom Sullivan, one of Flowers's neighbors, testified that she saw Flowers wearing Fila Grant Hill tennis shoes at 7:30 a.m. on the day of the murders. Elaine Goldstein, another neighbor, testified that she had seen Flowers wear Fila Grant Hill tennis shoes a couple of months before the murders.

¶ 13. Multiple witnesses placed Flowers at or around Angelica Garment Factory and Tardy Furniture on the morning of the murders. Katherine Snow, an Angelica Garment Factory employee, testified that she saw Flowers leaning against Simpson's car at 7:15 on the morning of the murders. Snow also identified Flowers in a photographic lineup and in court. James

Kennedy testified that he saw Flowers walking toward Angelica Garment Factory at 7:15 a.m. Edward McChristian testified that he saw Flowers walking north, away from Angelica Garment Factory, between 7:30 and 8:00 a.m. Mary Jeanette Fleming [sic] testified that she saw Flowers walking toward Tardy Furniture at approximately 9:00 a.m. Beneva Henry testified that she saw Flowers walking toward downtown Winona, in the direction of Tardy Furniture, sometime between 9:00 and 9:30 a.m.[3] Clemmie Fleming [sic] testified that she was going to Tardy Furniture to pay a bill a little after 10:00 a.m, and she saw Flowers running away from the back of Tardy Furniture.

¶ 14. Porky Collins testified that he saw two African-American men, who appeared to be arguing, outside Tardy Furniture at around 10:00 on the morning of the murders. Collins circled the block and returned to where he saw the men arguing; at that point, the men were headed toward Tardy Furniture. Collins identified Flowers as one of the men he saw that morning. Doyle Simpson testified that his 0.380 caliber pistol was in his car's glove compartment when he arrived at Angelica the morning of July 16, 1996. Simpson discovered that his gun was missing at approximately 11:00 a.m. that day. Simpson, who was Flowers's uncle,

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[3] Beneva Henry's testimony from Flowers's 2004 trial was read to the jury. In the nearly fifteen years between the 1996 murders and Flowers's sixth trial, several witnesses had died, moved out of state, or were otherwise no longer available to testify. Their testimony from prior trials had to be read to the jury. Those witnesses were Beneva Henry, Sam Jones, Porky Collins, Stacey Wright, and Billy Glover.

testified that Flowers knew he had a gun and that Flowers had seen it in his car before. Odell Hallmon, a jailhouse informant who had been in a cell next to Flowers, testified that Flowers had confessed to killing four people at Tardy Furniture.

¶ 15. After the State's case-in-chief, the defense moved for a directed verdict, which the trial court denied. The first witness to testify in the defense's case-in-chief was Mike McSparrin, a fingerprint expert. McSparrin testified that the fingerprints found at the crime scene, as well as on the Fila shoebox, did not match Flowers's fingerprints. The defense also called Steve Byrd, a firearms forensic analyst. Byrd testified that he could not definitively determine whether all of the bullets recovered from the crime scene were fired from the same gun. James Williams, a law enforcement investigator, testified that he did not see a bloody footprint when he first arrived at Tardy Furniture. Billy Glover testified that, on the day of the murders, he saw Flowers around 9:00 a.m. at a friend's house and that they talked for fifteen or twenty minutes. Connie Moore, Flowers's girlfriend at the time, testified that she had purchased a pair of size ten-and-a-half Fila Grant Hill tennis shoes for her son.

¶ 16. Stacey Wright testified that Clemmie Flemming had admitted to her that she had lied about seeing Flowers running away from Tardy Furniture on the morning of the murders. Wright testified that Clemmie had said she would get money or have her bill paid at Tardy Furniture in return for her statement against Flowers. Clemmie's sister, Mary Flemming,

testified that she was with Clemmie the morning of the murders and that Clemmie did not go to Tardy Furniture to pay her bill that morning. Latarsha Blissett also testified that Clemmie had told her that if she made a statement against Flowers, she would get money or have her account at Tardy Furniture paid. Further, Blissett testified that investigators had asked her if she knew Flowers's shoe size and had implied that she would receive reward money for providing a statement. Kittery Jones, Flowers's cousin, also testified that investigators had implied that he would receive reward money in return for providing a statement linking Flowers to the murders.

¶ 17. On June 18, 2010, the jury returned a guilty verdict for all four murders. Following the sentencing hearing, the jury sentenced Flowers to death. The jury found the following aggravating circumstances beyond a reasonable doubt: (1) the defendant knowingly created a great risk of death to many persons; (2) the capital offenses were committed while the defendant was engaged in the commission of an armed robbery for pecuniary gain; and (3) the capital offenses were committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Flowers filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, which was denied. Flowers timely filed a notice of appeal.

**Issues**

¶ 18. Flowers raises the following thirteen assignments of error on appeal:

1. The evidence presented at Flowers's trial was constitutionally insufficient to support a finding of guilt beyond a reasonable doubt, as mandated by the Fifth and Fourteenth Amendments to the United States Constitution and Section Fourteen of the Mississippi Constitution.

2. Flowers's right to a fair trial, as guaranteed by Mississippi law and the Fourteenth Amendment to the United States Constitution, was violated when the prosecution repeatedly argued material facts not in evidence during its culpability phase closing argument.

3. The in-court and out-of-court eyewitness identifications of Flowers by Porky Collins were constitutionally unreliable and the trial court erred in overruling Flowers's objections to their admission.

4. The trial court's exclusion of expert testimony explaining the deficiencies in law enforcement's investigation, and the defects in the composition of the photo lineups shown to Porky Collins, violated Mississippi law and Flowers's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in refusing to exclude prosecution testimony that a single particle of gunshot residue had been detected on Flowers's hand.

6. The jury selection process, the composition of the venire and the jury seated, and pervasive racial and other bias surrounding this matter violated Flowers's fundamental constitutional rights protected by the Sixth and Fourteenth Amendments.

    a. The prosecutor violated the Equal Protection Clause of the Fourteenth Amendment when he struck five African American jurors after utilizing disparate questioning and citing pretextual reasons.

    b. The jury failed to adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

    c. Pervasive racial bias in the venire infected the fairness of the proceedings, and requires reversal and remand for a new trial.

7. The State's six attempts to convict Flowers of the same offense violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

8. The trial court reversibly erred in refusing Flowers's requested circumstantial

evidence instructions at the culpability phase.

9. The trial court reversibly erred in the penalty phase instructions to the jury.

10. The convictions and death sentences in this matter were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the counterparts in the Mississippi Constitution.

11. This Court should set aside its prior order denying Flowers's Motion for Remand and Leave to File Supplemental Motion for New Trial.

12. The death sentence in this matter is constitutionally and statutorily disproportionate.

13. The cumulative effect of the errors mandates reversal of the verdict of guilt and/or the sentence of death entered pursuant to it.

We address each of Flowers's issues but have summarized and reorganized several issues for the purpose of discussion.

## Discussion

¶ 19. Heightened scrutiny is applied to review of capital murder convictions where the death sentence has been imposed. *Fulgham v. State*, 46 So.3d 315, 322 (¶ 16) (Miss. 2010) (citing *Bishop v. State*, 812 So.2d

934, 938 (¶ 7) (Miss. 2002)). "What may be harmless error in a case with less at stake [may become] reversible error when the penalty is death." *Id.* The standard of review for each issue will [sic] discussed throughout.

**I. Whether the in-court and out-of-court identifications of Flowers by Porky Collins were constitutionally unreliable, and whether the trial court erred in overruling Flowers's objections to their admission.**

¶ 20. Flowers claims that the trial court erred in admitting evidence of Porky Collins's out-of-court and in-court identifications of Flowers. Collins died in 2002, so his testimony from the 1999 trial was read to the jury. Collins's testimony was that, on the morning of the murders, he had seen two African-American men who appeared to be arguing outside Tardy Furniture. Collins thought the men were about to fight, so he circled the block and returned to see what was going on. The second time Collins saw the men, they were walking toward Tardy Furniture. Collins saw only one man's face when he drove past them.

¶ 21. After hearing about the murders at Tardy Furniture, Collins went to police the same day, reported what he had seen that morning, and gave a description of the men. On August 24, 1996, police showed Collins two photo arrays with six photos each—the first group included Doyle Simpson's photograph; the second group included Flowers's photograph. Collins testified that he was not expected to

identify the man whose face he did not see. According to police department notes, in response to the first photo array, Collins pointed to Simpson and said that he "looked like" the man he had seen, but he was unable to be positive. The entirety of the officer's handwritten notes were as follows:

> Porky Collins
>
> Picture Line-up 11:10 a.m.
>
> # 1 and # 3 resembles, but hairline was further back
>
> # 6 Pointed to Simpson said hairline like this, may have appeared a little darker.
>
> "But it looks like him."
>
> "Face was also same shape, round like this."
>
> "Unable to be positive."

Collins then was shown the second photo array, and he identified Flowers as the man he had seen in front of Tardy Furniture. The officer administering the photo array made the following notes:

> 2nd Line Up
>
> 11:16 a.m.
>
> Pointed to Curtis Flowers # 4
>
> "I think that's him."
>
> "He was about my height."
>
> "I'm 5' 10""

"The complexion is also right."

"I believe that's him, it look[s] like him."

Identified # 4

I asked Porky if he knew Curtis Flowers, he said, "No. But I know the person I just identified is the person I saw in front of Tardy's 7–16–96."

During the 1999 trial, Collins identified Flowers in court as the man whose face he had seen outside Tardy Furniture. Flowers filed a pretrial motion to suppress Collins's out-of-court and in-court identifications, which the trial court denied. On appeal, Flowers claims that the trial court erred in admitting Collins's identifications into evidence.

¶ 22. The standard of review for a trial court's suppression hearing findings regarding pretrial identifications is whether "substantial credible evidence supports the trial court's findings that, considering the totality of the circumstances, in-court identification testimony was not impermissibly tainted." *Butler v. State*, 102 So.3d 260, 264 (¶ 8) (Miss. 2012) (quoting *Gray v. State*, 728 So.2d 36, 68 (¶ 159) (Miss. 1998)). For an out-of-court or in-court identification to be excluded, "it must be the result of an impermissibly suggestive lineup *and* the identification must be unreliable." *Butler*, 102 So.3d at 264 (¶ 8) (citing *York v. State*, 413 So.2d 1372, 1383 (Miss. 1982)). First, the court must "determine whether the identification process was unduly suggestive." *Latiker v. State*, 918 So.2d 68, 74 (¶ 15) (Miss. 2005) (citing *Neil v. Biggers*, 409

U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). Second, even if the identification process was unduly suggestive, the identification still can be admitted if "the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." *Id.*

### A. Collins's Out-of-Court Identification

¶ 23. Flowers claims that the out-of-court photo lineup was unduly suggestive because the photo array was skewed toward Flowers in several ways. He claims that his head was larger than the others and that the other men had lighter complexions, were younger than him, and had varying hairstyles and facial features. We have summarized the standard applied to out-of-court identifications as follows:

> A lineup or series of photographs is impermissibly suggestive if "the accused, when compared with the others, is conspicuously singled out in some manner from the others, either from appearance or statements by an officer." . . . To be excluded, an out-of-court identification must have resulted from an identification procedure that was so impermissibly suggestive as to give rise to "a very substantial likelihood of misidentification." . . . Where the defendant is "the only one depicted with a distinctive feature," courts usually will find the lineup to be impermissibly suggestive. . . . On the other hand, "minor differences" with the suspects or differences in the photograph backgrounds

> will not render a lineup impermissibly suggestive. . . .

*Butler*, 102 So.3d at 264–65 (¶¶ 9–11) (citations omitted). Applying the standard articulated in *Butler*, we recently held that a photo lineup was not impermissibly suggestive even though the defendant was the only person in the lineup with facial tattoos. *Stewart v. State*, 131 So.3d 569, 574 (¶ 16) (Miss. 2014). In *Stewart*, we concluded:

> We find that the case *sub judice* is similar to the cases of *White*, *Foster*, and *Jones*, in which this Court upheld similar identifications. In *White*, the witness noticed the defendant's plaited hair and forehead tattoo during the commission of the crime. *White v. State*, 507 So.2d 98, 99 (Miss. 1987). This Court upheld the out-of-court and in-court identifications of the defendant even though the defendant was the only suspect in the lineup with plaited hair. *Id.* at 99–101. The defendant also had a forehead tattoo, which the witness identified at trial. BI at 99–100. In *Foster*, this Court upheld the out-of-court and in-court identifications of the defendant even though he was the only person in the lineup wearing a fishing hat, where the defendant had worn a fishing hat during the robbery. *Foster v. State*, 493 So.2d 1304, 1305–06 (Miss. 1986). Likewise, in *Jones*, this Court upheld the out-of-court and in-court identifications of the defendant even though he was the only suspect in the photo lineup wearing a hat similar to the one worn by the attacker. *Jones v. State*, 504 So.2d 1196,

> 1199–1200 (Miss. 1987). This Court found that, even though the hat may have played a significant part in the identification, it was not impermissibly suggestive, because the witness had given an accurate description and identified the defendant with great conviction at trial. *Id.* at 1200.

*Id.* at 573 (¶ 12).

¶ 24. In the photo array that included Flowers's photograph, Flowers's head is slightly larger than the others, as it appears his photo was taken from a closer angle than the others. However, the use of a different photographic technique creates only a minor difference, and that is not enough to render the photo lineup impermissibly suggestive. *Batiste v. State*, 121 So.3d 808, 856 (¶ 116) (Miss. 2013). The other characteristics Flowers claims caused the array to be suggestive are not present—three other men have complexions similar to Flowers's complexion; Flowers appears to be the same age or only slightly older than the other men; two of the other men have hair styles similar to Flowers's; and three of the other men have facial hair similar to his. Accordingly, Flowers fails to show that the lineup was unduly suggestive. Further, Collins provided a description to police on the day of the murders, and he was confident in his identification of the man he saw in front of Tardy Furniture. The trial court did not err in admitting Collins's out-of-court identification. Because the lineup was not impermissibly suggestive, we need not consider the *Biggers* factors for reliability.

### B. Collins's In-Court Identification

¶ 25. Although Flowers's issue statement asserts that Collins's in-court identification was "constitutionally unreliable," he provides no substantive argument or support for that claim. The extent of his argument is a footnote, which provides: "there is no issue of the admissibility of the in-court identification, given that Collins could not positively identify Flowers in the courtroom at the second trial, and was deceased by the time of this, the sixth trial." His assertion is incorrect. Collins unequivocally identified Flowers at the second trial. Flowers also implies that the typical jury consideration of determining Collins's credibility is not applicable in the case *sub judice* because his testimony was read to the jury, as opposed to live testimony. Although the jury did not personally observe Collins testifying, defense counsel's cross-examination of Collins adequately addressed credibility. For example, defense counsel asked Collins about his memory, any medication he was taking that could affect his memory, and whether he wore glasses. The characteristics of trial itself—trial by jury, an impartial judge, representation by counsel, and witnesses subject to an oath and cross-examination—adequately protect against any suggestiveness of in-court identifications at trial. *Galloway v. State*, 122 So.3d 614, 663 (¶ 164) (Miss. 2013).

¶ 26. Although Flowers does not claim that Collins's in-court identification was tainted by the alleged suggestiveness of the out-of-court identification, that is the argument often made by defendants. *See Butler*, 102 So.3d at 266–67. We have held that "an

impermissibly suggestive pretrial identification does not preclude in-court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it, (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable* misidentification." *Id.* at 267 (¶ 17) (quoting *York*, 413 So.2d at 1383). Collins's out-of-court identification was not impermissibly suggestive; therefore, it could not give rise to the likelihood of an irreparable misidentification. For the reasons given above, the issue is without merit.

## II. Whether the trial court's exclusion of expert testimony violated Mississippi law and Flowers's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

¶ 27. Flowers contends that the trial court erred by excluding the testimony of two experts—Robert Johnson and Dr. Jeffrey Neuschatz. Flowers tendered Johnson as an expert in criminal investigation procedures, but the trial court did not permit Johnson to testify. In Flowers's fourth trial, he filed a motion to determine the admissibility of Dr. Neuschatz's testimony on the reliability of eyewitness identification evidence. Flowers renewed the motion in the present case, and the trial court denied the motion.

¶ 28. We apply an abuse of discretion standard when reviewing the exclusion of expert testimony. *Gillett v. State*, 56 So.3d 469, 494 (¶ 61) (Miss. 2010). Analysis of the admissibility of expert testimony begins with Mississippi Rule of Evidence 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Miss. R. Evid. 702. The expert testimony must be both relevant and reliable to be admissible. *Gillett*, 56 So.3d at 495 (¶ 63). "Expert testimony is relevant if it will 'assist the trier of fact in understanding or determining a fact at issue.'" *Galloway*, 122 So.3d at 632 (¶ 27) (quoting *Ross v. State*, 954 So.2d 968, 996 (¶ 57) (Miss. 2007)). To determine reliability, the following nonexhaustive list of factors may be considered: whether the expert's theory can be or has been tested; whether the theory has been the subject of peer review and publication; the known or potential rate of error of the technique or theory when applied; the existence of standards to control the technique's operation; and the general acceptance the theory has garnered in the relevant expert community. *Gillett*, 56 So.3d at 495 (¶ 64)

(citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 37 (Miss. 2003); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). "The applicability of these factors varies depending on the nature of the issue, the expert's particular expertise, and the subject of the testimony." *Gillett*, 56 So.3d at 495 (¶ 64) (citing *McLemore*, 863 So.2d at 37).

### A. Robert Johnson

¶ 29. Flowers attempted to call Robert Johnson as an expert in criminal investigation procedures, and the State objected. Johnson would have testified that the criminal investigation was flawed in various ways. After a lengthy voir dire, the trial court held that Johnson could not testify because "there is no valid way of testing the field of police investigatory techniques." The trial court also found that, even if Johnson's testimony met the reliability prong of *Daubert*, the testimony was cumulative because the law enforcement officers who already had testified at trial were throughly cross-examined and had admitted that there were flaws in the investigation. Flowers also attempted to have Johnson give an expert opinion relating to the photographic array shown to Collins. The trial court excluded the testimony because Johnson stated during his voir dire that he did not have sufficient information about the lineup.

### 1. Johnson's Proffered Testimony

¶ 30. During the voir dire, Johnson testified at length about his law enforcement experience. Johnson is currently a law enforcement consultant and previously served as police chief in Jackson, Mississippi; Jackson, Michigan; and Lansing, Michigan. He was Commissioner of the Mississippi Department of Corrections from 2000 to 2002. Johnson has a master's degree in public administration, and he graduated from the FBI National Academy and the FBI Law Enforcement Executive Development program. During his career, Johnson performed homicide investigations as a detective and directly supervised homicide investigations. Johnson also developed protocols for criminal investigations.

¶ 31. Johnson testified that generally accepted standards for homicide investigations exist, and he opined that the investigation in today's case failed to meet them in various ways. First, Johnson said the investigation lacked management and organization. In support of his contention, Johnson referred to the testimony of law enforcement officers who said the investigation was a "shared responsibility." Johnson also said the investigation lacked an in-depth case file, which should have included all original notes and reports. Johnson testified: "There has to be somebody who is the recipient of all the information coming from a variety of sources and is able to correlate that information and further direct the direction that the investigation needs to develop." He said that the investigation also lacked written reports of events.

¶ 32. Johnson next criticized the crime scene integrity. Johnson said that the integrity of the crime scene could have been compromised by law enforcement officers and investigators meeting within the crime scene to discuss and organize the investigation. According to Johnson, a crime scene log should have been maintained listing who came and went from the crime scene to ensure that it was not contaminated. Next, Johnson testified that he was "concerned" about the investigation's early focus on one suspect—Flowers—to the exclusion of any other suspects. Johnson said early focus can result in lost evidence: "It's okay to very quickly focus on one suspect; that happens all the time, you know. But to the exclusion of all else and all others is where it becomes problematic, and you sometimes lose vital evidence that may be had because you haven't included and kept them in as a potential suspect or person of interest."

¶ 33. On cross-examination, Johnson admitted that Mississippi has no minimum standards for criminal investigations. He also admitted that the Justice Department guidelines he mentioned in direct examination were not requirements and that there are no national minimum standards for criminal investigations. Johnson stated that, rather than minimum standards, he based his opinions on generally accepted practices in police work. Further, when asked if he could provide an opinion on whether investigations that lack written reports lead to incorrect results, Johnson said investigations with written reports are "more complete." He did not, however, state that an

investigation without a written report would lead to an incorrect result.

### 2. Admissibility of Johnson's Testimony

¶ 34. The *Daubert* factors apply to expert testimony relating to police investigatory techniques. *See Ross v. State*, 954 So.2d 968, 996–97 (Miss. 2007) ("*Ross I*"). In *Ross I*, the defendant proffered an expert who opined that the securing of the crime scene and evidence collection were deficient. *Id.* at 997 (¶ 61). Although the Court held the testimony did not meet the reliability standards of *Daubert* and *McLemore*, the opinion did not discuss why the testimony was unreliable. *Id.* The judgment was reversed and the case remanded for other reasons. *Id.* at 1019–20 (¶¶ 138–41). The defendant was convicted again and appealed, and the case was assigned to the Court of Appeals. *Ross v. State*, 22 So.3d 400 (Miss. Ct. App. 2009) ("*Ross II*"). In *Ross II*, the Court of Appeals addressed the proffered expert testimony and found that the trial court did not err in excluding the testimony. *Id.* at 420–21 (¶¶ 99–104). First, the expert testimony was cumulative because the investigating officers had been cross-examined about their investigative techniques and had admitted that "things could have been handled better." *Id.* at 421 (¶ 102). Second, the trial court did not abuse its discretion by finding that the testimony failed to meet the *Daubert* reliability prong because the expert's "memberships and associations were voluntary and fee based, not peer reviewed or tested" and "the trial court was unable to evaluate the value of [the expert's]

certifications because the trial court was unaware of the requirements for certification." *Id.* at 421 (¶¶ 103–104).

¶ 35. Under Rule 702, the first prong of the inquiry for determining whether expert testimony should be admitted is whether the witness is "qualified by virtue of his or her knowledge, skill, experience[,] or education." *Galloway*, 122 So.3d at 632 (¶ 28) (quoting *McLemore*, 863 So.2d at 35). Johnson certainly is qualified through his knowledge, experience, and training in the field of criminal investigations. Further, there is no question that Johnson's testimony is relevant. Johnson's testimony addressed facts relating to the criminal investigation that eventually led to Flowers's arrest; thus, his testimony had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Miss. R. Evid. 401.

¶ 36. The critical inquiry, however, is whether Johnson's testimony is reliable. The trial court focused on the inability to test Johnson's theories as a basis for excluding the testimony, holding: "Because there is no valid way of testing the field of police investigatory techniques, this Court finds the proposed testimony in the field fails to meet the reliability standards required under Rule 702." Whether the expert's theory can be tested is one factor to be considered under *Daubert*, but it is not conclusive. Johnson's proffered testimony is not the typical expert testimony contemplated by the testing factor—for example, one cannot test what effect

the lack of organization and leadership would have on a murder investigation. As such, reliance on the testing factor alone would have been error. However, the trial court cited other reasons for excluding the testimony.

¶ 37. The trial court also found that, although Johnson testified that the investigation fell below generally accepted standards and practices in law enforcement, Johnson did not sufficiently articulate the standards. *See McGee v. River Region Med. Ctr.*, 59 So.3d 575, 579 (¶ 13) (Miss. 2011) (An expert testifying about a failure to meet generally accepted standards must "identify and articulate the requisite standard that was not complied with.") A review of the proffered testimony reveals that Johnson did articulate standards relating to some—but not all—of his opinions. Johnson offered four opinions: (1) that the investigation lacked organization and management; (2) that the integrity of the crime scene was compromised; (3) that the investigation focused on one suspect too quickly; and (4) that the photo lineup used during Collins's identification was flawed. Johnson did not articulate a standard for his opinion relating to the investigation's early focus on Flowers as a suspect. And Johnson said that he was not familiar with the procedures used during Collins's identification. Thus, the trial court did not err in excluding his testimony. *See Dedeaux Util. Co., Inc. v. City of Gulfport*, 938 So.2d 838, 841 (Miss. 2006) (expert testimony must be based on sufficient facts and data).

¶ 38. Johnson did provide applicable standards for his opinions related to the investigation's organization

and management and crime scene integrity. Regarding the investigation's organization and management, Johnson testified that, based on his experience and knowledge, the investigation should have had centralized leadership that collected information, maintained the case file, and directed the investigation. Johnson said, "There has to be somebody who is the recipient of all the information coming from a variety of sources and is able to correlate that information and further direct the direction that the investigation needs to develop." Regarding crime scene integrity, Johnson said a crime scene log should have been maintained at the crime scene. He explained that the crime scene can be contaminated, evidence can be overlooked, and evidence can be deposited after the crime. He said, "There may be a number of issues related to the presence of people at the crime scene, so you want to have a record of when they were there, how long they stayed and when they left."

¶ 39. Although Johnson provided some standards on which he based his opinions, we cannot say the trial judge abused his discretion when he held the standards insufficient. Johnson testified that the standards he applied in forming his theories were "generally accepted practices in police work." Certainly, expert testimony can be based on experience, and one factor that may be considered in determining reliability is general acceptance in the relevant expert community. *See Gillett*, 56 So.3d at 495 (¶ 64); *Daubert*, 509 U.S. at 593–94, 113 S.Ct. 2786. But Johnson did not provide support for his statement that the practices he

referenced were, in fact, generally accepted. Allowing an expert simply to state that his opinions are based on "generally accepted practices," without support for the assertion, could lead to essentially permitting experts to qualify themselves. While Johnson's opinions and standards seem sensible, we cannot say that he presented enough evidence that his opinions were sufficiently reliable such that the trial court abused its discretion by not allowing the testimony.

¶ 40. Further, the trial court was correct that Johnson's testimony was cumulative. Law enforcement officers who participated in the investigation were thoroughly questioned about the investigation and admitted that there were flaws in the investigation. Specifically, officers admitted that a crime scene log was not maintained, and the police chief testified that one should have been maintained. The officers also admitted that there was not a lead investigator, and the police chief testified that responsibilities should have been assigned, an investigative plan should have been developed, and information should have been shared with investigators and first responders. The trial court did not commit an abuse of discretion in not allowing Johnson's testimony.

### B. Dr. Jeffery Neuschatz

¶ 41. During Flowers's fourth trial, he filed a motion to determine the admissibility of Dr. Neuschatz's testimony on the reliability of eyewitness identification evidence. Dr. Neuschatz's affidavit and *curriculum*

*vitae* were attached to the motion. Dr. Neuschatz's affidavit essentially provided two opinions: (1) that Collins's identification of Flowers could have been affected by a number of different circumstances; and (2) that the identification procedure was flawed. Before the fourth trial commenced, the State announced that it would not seek the death penalty, and Flowers withdrew his motion regarding Dr. Neuschatz's testimony.[3]

¶ 42. At Flowers's fifth trial, the State sought the death penalty, and Flowers renewed his motion to determine the admissibility of Dr. Neuschatz's testimony. The court held a hearing on the motion, but Flowers did not provide a proffer of Dr. Neuschatz's testimony other than the affidavit previously submitted. The trial court denied the motion, holding that, because Collins was extensively cross-examined, the expert testimony would not assist the jury:

> And he was extensively cross-examined, even into the most minute detail about issues concerning what path he took driving around town that morning. He stated in his testimony that he had a brief glimpse of who he believed to be Mr. Flowers.
>
> There was—he was cross-examined about his ability to remember things. He was cross-examined about whether he had had difficulty with memory problems in the past. I mean I do not think there could be a more thorough

[3] Flowers's counsel apparently believed that eyewitness identification expert testimony was not admissible in noncapital cases.

> cross-examination of a witness than was done with Mr. Collins.
>
> So I think given the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witness identification would assist the jury in the least bit in this case.

The court also found that Flowers did not demonstrate that Dr. Neuschatz's testimony was reliable based on the *Daubert* factors. In the present case, Flowers renewed his motion on the admissibility of Dr. Neuschatz's testimony. The trial court denied the motion, adopting its ruling from the fifth trial.

¶ 43. Again, in determining whether expert testimony is reliable, the court may consider the following factors: whether the expert's theory can be or has been tested; whether the theory has been the subject of peer review and publication; the known or potential rate of error of the technique or theory when applied; the existence of standards to control the technique's operation; and the general acceptance that the theory has garnered in the relevant expert community. *Gillett*, 56 So.3d at 495 (¶ 64) (citing *McLemore*, 863 So.2d at 37, and *Daubert*, 509 U.S. at 592–94, 113 S.Ct. 2786). The admissibility of Dr. Neuschatz's testimony was addressed recently in *Corrothers v. State*, 148 So.3d 278 (Miss. 2014), *reh'g denied* (Oct. 23, 2014). In *Corrothers*, the Court applied Rule 702 and *Daubert* to Dr. Neuschatz's testimony concerning the reliability of

eyewitness identification procedures and found that Dr. Neuschatz's testimony was unreliable:

> Dr. Neuschatz attempted to apply the principles and methodologies underlying his expertise in eyewitness identification to opine that [the eyewitness's] identification "could" be unreliable. But Dr. Neuschatz's opinions were undermined by his inaccurate and incomplete understanding of the facts on which he based his opinions and his complete lack of expertise on [the eyewitness's] brain injury. These deficiencies rendered his opinions so fundamentally unsupported that they could offer no assistance to the jury and amounted to nothing more than unsupported speculation. His testimony was unreliable, and there was no abuse of discretion in excluding it. We further note that Dr. Neuschatz's testimony was inconclusive and speculative because he did not offer his opinions to a reasonable degree of scientific certainty, but testified only that Josh's lineup identification "could" be unreliable and that in-court identifications "probably" are suggestive. Nor did Dr. Neuschatz submit any peer-reviewed publications supporting his principles and methodologies; the trial court had only the benefit of Dr. Neuschatz's curriculum vitae and his testimony that his studies had been subjected to peer review and publication and were generally accepted in the relevant scientific community. These facts further support the exclusion of Dr. Neuschatz's testimony.

*Corrothers*, 148 So.3d at 297 (¶ 35).

¶ 44. In the instant case, the trial court applied the *Daubert* factors and held that Dr. Neuschatz's theories were not generally accepted and that he did not provide information about the rate of error or the principles and methods used. As to the first factor, Dr. Neuschatz's affidavit cited several tests that support his theory that exposure time, appearance change/disguise, and post-identification feedback may affect eyewitness identifications. However, he did not submit documentation of the tests. Regarding peer review and publication, Dr. Neuschatz's affidavit stated that he has "published several articles in peer reviewed journals, written peer invited chapters, and presented [his] research findings at regional and national conferences." Again, however, he did not provide the articles. The same was true in *Corrothers*. *Corrothers*, 148 So.3d at 297 (¶ 35). Dr. Neuschatz's affidavit did not mention anything relevant to the third or fourth factors—the known or potential rate of error of the applied theory and the existence of standards and controls—therefore, the factors were not satisfied. Finally, Dr. Neuschatz cited several articles and studies supporting his theories to show that his theory is accepted in the scientific community but again, the articles were not submitted.

¶ 45. Because Flowers did not provide an additional proffer of Dr. Neuschatz's testimony, we have no way of knowing whether Dr. Neuschatz could have offered further support for the *Daubert* factors if he had provided live testimony. We do not hold that every expert is required to submit every article or report on

which he or she relies. However, here, the trial judge—in exercising his considerable discretion—found that the defense did not present sufficient evidence in support of Dr. Neuschatz's opinions. The trial judge did not abuse his discretion in concluding that the affidavit alone was insufficient to withstand the *Daubert* analysis and in denying Dr. Neuschatz's testimony.

¶ 46. Dr. Neuschatz's affidavit included two opinions: that Collins's identification could have been affected by several factors and that the photo identification process was flawed. Regarding the photo array, the same issue was addressed in *Corrothers*, and we held that Dr. Neuschatz's testimony may have been more prejudicial than probative due to the risk of confusion. *Corrothers*, 148 So.3d at 297 (¶ 36). Allowing testimony from Dr. Neuschatz that the photo identification process was flawed, while also admitting evidence of the identification because the court determined that it was not impermissibly suggestive, could result in confusing the jury.[4] Thus, the trial court did not err in excluding

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[4] In *Corrothers*, Presiding Justice Randolph wrote the following about the admission of Dr. Neuschatz's testimony on a photo lineup after the judge determined that the lineup was admissible:

> Neuschatz also proffered a criticism of the photo lineups presented to Josh, previously ruled admissible by the trial judge. Such generalized expert testimony in limited circumstances may be pertinent at a hearing on a motion to suppress, but once the court has ruled photo-lineup evidence is admissible, offering such testimony at trial encroaches upon a legal issue already determined and usurps the trial judge's discretionary authority.

*Corrothers*, 148 So.3d at 340–41 (¶ 184) (Randolph, P.J., specially concurring).

Dr. Neuschatz's testimony about the photo-identification process.

¶ 47. As to Collins's identification, discussed at length *supra*, the judge held: "[G]iven the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witness identification would assist the jury in the least bit in this case." The quoted finding represents precisely the type of finding the trial judge is called upon to make. In determining the admissibility of expert testimony, the trial judge must determine whether the testimony will "assist the trier of fact" in understanding the evidence or issues, and the judge must be satisfied that the testimony is "more probative than prejudicial." *Corrothers*, 148 So.3d at 294 (¶¶ 24, 27) (citations omitted).

¶ 48. We recognize that many courts admit expert testimony regarding eyewitness identification, and we do not hold that such expert testimony is *per se* inadmissible. Rather, we recognize that the decision of "whether to admit this testimony is squarely within the discretion of the trial judge[.]" *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986). In *Moore*, the Fifth Circuit explained that "the trial court should exercise its discretion in deciding whether or not to admit it and should balance the reliability of the testimony against the likelihood that the testimony would overwhelm or mislead the jury." *Id.* (discussing *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985)). The *Moore* Court recognized that a trial judge's exclusion of expert eyewitness testimony was not harmful where

"there was evidence indicating guilt apart from the eyewitness identification." *Id.* (citing *United States v. Smith*, 736 F.2d 1103, 1108 (6th Cir. 1984)). The *Moore* court wrote:

> [I]n the present case we do not find that the district court abused its discretion in refusing to admit this evidence. We have earlier held and we now affirm that the decision whether to admit this testimony is squarely within the discretion of the trial judge and properly so. . . . Although admission of expert eyewitness testimony is proper, there is no federal authority for the proposition that such testimony *must* be admitted. The district judge has wide discretion in determining the admissibility of this evidence, and we hold that the district judge did not abuse his discretion in this case.
>
> In some cases casual eyewitness testimony may make the entire difference between a finding of guilt or innocence. In such a case expert eyewitness identification testimony may be critical. But this is not at all the situation in the case before us. Even if the eyewitness identifications of Lamberth and Holder are completely disregarded, the other evidence of guilt is overwhelming. . . .
>
> We emphasize that in a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged. In the present case, we find no abuse of discretion in not admitting

> such evidence. This was not a case where casual eyewitness identifications were at all critical.

*Moore*, 786 F.2d at 1312–13 (internal citations omitted).

¶ 49. Like the eyewitnesses in *Moore*, Collins's identification was far from the only evidence of guilt in the instant case, and it cannot be labeled "critical." No fewer than seven other witnesses placed Flowers near Angelica Garment Factory, where Simpson's gun was stolen, and near Tardy Furniture on the morning of the murders. Collins's testimony was no different. He identified Flowers as a man he saw outside Tardy Furniture. Out of all of the witnesses, Collins was the only witness placing Flowers near the scene who did not know Flowers. The other witnesses provided even more credible testimony as they recognized Flowers by sight, having known him previously. If the case hinged on Collins's identification of Flowers, expert testimony on eyewitness identification may have been helpful to the jury. However, as in *Moore*, that was not the situation.

¶ 50. The trial judge made a rational and reasoned decision regarding the admissibility of Dr. Neuschatz's testimony based on the totality of the facts before him. We afford "the widest possible discretion" to a trial judge's determination on the admissibility of expert testimony, and "that decision will only be disturbed when there has been a clear abuse of discretion." *Smith v. State*, 925 So.2d 825, 834 (¶ 23) (Miss. 2006) (quoting *Logan v. State*, 773 So.2d 338, 346–47

(¶ 31) (Miss. 2000)). The trial judge's ruling on Dr. Neuschatz's testimony was not an abuse of discretion. The issue is without merit.

### III. Whether the trial court erred in not excluding evidence of a single particle of gunshot residue found on Flowers's hand.

¶ 51. Investigator Jack Matthews interviewed Flowers on the day of the murders and asked him to submit to a gunshot residue test. Flowers agreed to the test. A single particle of gunshot residue was found on the back of Flowers's right hand. Joe Andrews, a forensic scientist who analyzed the gunshot residue test, testified that three scenarios can result in the presence of gunshot residue on a person's hands: (1) the person actually fired a gun; (2) the person was in close proximity to a discharged gun; or (3) the person handled an object that had gunshot residue on it. At trial, Flowers moved to exclude the evidence concerning the gunshot residue, and the trial court denied the motion. Flowers contends that the trial court erred in admitting evidence that a particle of gunshot residue was found on his hand approximately three hours after the murders were reported. Flowers claims that the prejudicial effect of the evidence greatly outweighed the probative value, so it was inadmissible under Mississippi Rule of Evidence 403.

¶ 52. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Miss. R. Evid. 403. Applying Rule 403, the trial judge must conduct a balancing test to determine if the probative value of the evidence is "*substantially* outweighed by the danger of unfair prejudice[.]" *McGowen v. State*, 859 So.2d 320, 329 (¶ 29) (Miss. 2003). On appeal, we review a trial court's decision for abuse of discretion. *Stone v. State*, 94 So.3d 1078, 1085 (¶ 20) (Miss. 2012); *Baldwin v. State*, 784 So.2d 148, 156 (¶ 27) (Miss. 2001). We do not reweigh the evidence and conduct a new balancing test. "The question on review is not whether this Court would have admitted the evidence, but whether the trial court abused its discretion in doing so[.]" *Stone*, 94 So.3d at 1085 (¶ 20). *See also Baldwin*, 784 So.2d at 156 (¶ 27) (on appeal we "must simply determine whether the trial court abused its discretion in weighing the factors and admitting or excluding the evidence").

¶ 53. Flowers cites *Foster v. State*, 508 So.2d 1111 (Miss. 1987), in support of his argument. In *Foster*, the prosecution presented testimony that paint chips found on the victim's clothing were similar to paint chips found in the defendant's car. *Id.* at 1117. A chemist testified that the paint chips were "indistinguishable in color, texture, and inorganic chemical composition; and that they therefore could have had a common origin." *Id.* The State also presented evidence that the victim's stab wound was caused by a knife found in the defendant's car or one similar to it. *Id.* The

Court characterized the testimony in *Foster* as "could have" testimony, which easily could mislead a jury, and held that the testimony was too speculative to be admissible. *Id.* at 1118. Thus, the Court held that the probative value of the testimony was substantially outweighed by the danger of misleading the jury. *Id.* at 1117–18.

¶ 54. We have distinguished *Foster* in other cases when the risks associated with "could have" testimony did not outweigh the probative value. In *McGowen v. State*, the Court held testimony that a victim's physical condition likely was caused by sexual assault did not result in unfair prejudice or jury confusion. *McGowen*, 859 So.2d at 334 (¶ 46). *McGowen* was distinguishable from *Foster* because the testimony in *McGowen* "did not employ or rely on phrases such as 'could have' or 'possible.' Rather, [the witness] merely testified as to the condition of [the victim's] body." *Id.* at 331 (¶ 36).

¶ 55. In the instant case, Andrews testified that the presence of gunshot residue could result from three scenarios, and Andrews's testimony was clear that the residue did not unequivocally prove that Flowers had fired a gun:

> Q: Now, you are not telling the jury, are you, that finding a single particle of gunshot residue says that any individual actually pulled the trigger on a firearm, are you?
>
> A: No, ma'am. The conclusions you can draw from finding and identifying the gunshot residue on the hands of the person are

> one of three conclusions: That person has discharged a weapon. That person has been in close proximity to a discharged weapon or that person has handled an object that has gunshot residue on it. Those are the three conclusions you can draw from a positive gunshot residue identification.
>
> . . .
>
> Q: The fact that you found that single particle does not bring this jury or us one step closer to knowing [by] which one of these three means that gunshot residue particle got on Mr. Flowers's hand; is that correct?
>
> A: Yes, ma'am, that's correct.

Andrews's testimony is distinguishable from the testimony contemplated in *Foster*. Andrews set out three events that could result in a person having gunshot residue on his hands. He clearly explained that the gunshot residue did not unequivocally show that Flowers had fired a gun. Because Andrews's testimony was clearly explained, there is little risk that the jury was confused or misled by the testimony. As such, the testimony was admissible under Rule 403, and the trial judge did not abuse his discretion in admitting it. The issue is without merit.

**IV. Whether the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt, as mandated by the Fifth and Fourteenth Amendments to the United States Constitution and Section Fourteen of the Mississippi Constitution.**

¶ 56. Flowers claims that the evidence produced at trial was insufficient to support the verdict. He attacks the sufficiency of the evidence from multiple angles: (1) lack of motive; (2) lack of evidence that Flowers knew Simpson kept a gun in his car; (3) lack of evidence that one person, acting alone, committed the murders; (4) lack of the eyewitness credibility; and (5) lack of probative value of physical evidence. Flowers contends that the instant case is one of circumstantial evidence rather than direct evidence; therefore, he argues that the State was required to meet a higher burden of proof.

¶ 57. At the end of the State's rebuttal, Flowers moved for judgment notwithstanding the verdict (JNOV). The trial court denied the motion. "A motion for JNOV challenges the legal sufficiency of the evidence." *Taylor v. State*, 110 So.3d 776, 782 (¶ 19) (Miss. 2013) (citing *Knight v. State*, 72 So.3d 1056, 1063 (¶ 24) (Miss. 2011)). We apply the following standard when reviewing the sufficiency of the evidence:

> When ruling on a motion for JNOV, the trial court must view all credible evidence consistent with the defendant's guilt in the light most favorable to the State. The Court will not

> disturb the trial court's ruling if the evidence shows beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction, and reversal is required. Thus, the Court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Taylor*, 110 So.3d at 782 (¶ 19) (internal citations and quotations omitted). Flowers was charged with four counts of capital murder with the underlying felony of armed robbery. Thus, the State was required to prove that Flowers killed each of the victims "without the authority of law by any means or any manner . . . [w]hen done with or without any design to effect death, [while] engaged in the commission of the crime of . . . robbery. . . ." Miss. Code Ann. § 97–3–19(2)(e) (Rev. 2014).

### A. Burden of Proof

¶ 58. Because Flowers claims that the burden of proof—and, consequently, the sufficiency of the evidence analysis—depends on whether the evidence is direct or circumstantial, we address burden of proof first. Flowers claims that the case is based on circumstantial evidence, not direct evidence. Therefore, he claims that the State must meet the following burden of proof:

> It is fundamental that convictions of crime cannot be sustained on proof which amounts to no more than a possibility or even when it amounts to a probability, but it must rise to the height which will exclude every reasonable doubt; that when in any essential respect the State relies on circumstantial evidence, it must be such as to exclude every other reasonable hypothesis than that the contention of the State is true, and that throughout the burden of proof is on the State.

*Westbrook v. State*, 202 Miss. 426, 32 So.2d 251, 252 (1947).

¶ 59. Flowers's case, however, is not a case of circumstantial evidence. If an eyewitness is produced or a statement from the defendant is admitted, the case is not circumstantial. *Rubenstein v. State*, 941 So.2d 735, 785 (¶ 225) (Miss. 2006); *Ladner v. State*, 584 So.2d 743, 750 (Miss. 1991). Further, a defendant's "admission of culpability . . . to a third party who is not a law enforcement officer constitutes direct evidence of a crime." *Minor v. State*, 831 So.2d 1116, 1119 (¶ 9) (Miss. 2002) (citing *Ladner*, 584 So.2d at 750). In *Ladner*, the Court held that a case is not based only on circumstantial evidence even if the only direct evidence is a "jailhouse confession." *Ladner*, 584 So.2d at 750. *See also Foster*, 508 So.2d at 1115 (Court held that, without the jailhouse confession, the prosecution's case would have been entirely circumstantial), *overruled on other grounds by Powell v. State*, 806 So.2d 1069 (Miss. 2001).

¶ 60. Odell Hallmon, a jailhouse informant, testified that Flowers had told him that he had committed the murders. According to *Ladner*, a jailhouse informant's testimony is considered direct evidence, and when a jailhouse informant's testimony is present, the case is not circumstantial. *See Moore v. State*, 787 So.2d 1282, 1288 (¶ 18) (Miss. 2001) (discussing *Ladner*, 584 So.2d at 750). Following the Court's holdings in *Ladner* and *Moore*, the trial judge found that Hallmon's testimony provided direct evidence of the crimes. We hold that the trial judge did not err in applying the Court's precedent. Under *Ladner*, the case *sub judice* is not one of circumstantial evidence, and the *Westbrook* standard suggested by Flowers does not apply.

### B. Sufficiency of the Evidence

¶ 61. Flowers claims that the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt. Flowers asserts that the State failed to prove motive; that there was a lack of evidence that Flowers knew Simpson kept a gun in his car; that the evidence does not support the State's theory that the murders were committed by a single gunman; that the eyewitnesses were not credible; and that the physical evidence lacked probative value. First, although Flowers vehemently argues on appeal his theory that the number of victims and the placement of the gunshot wounds demonstrate that the murders were "almost certainly *not* a one-man crime," that theory was not presented at trial. Therefore, Flowers cannot raise it on appeal. *Lyons v. State*, 766 So.2d 38, 40

(¶ 7) (Miss. Ct. App. 2000) ("Failure to raise this defense waives the right of the appellant to raise it here.").

¶ 62. Regarding motive, Flowers claims that the State failed to prove that he was so aggrieved about being firing [sic] from Tardy Furniture that the firing resulted in his murdering four people. To support his contention, Flowers cites his statement given to the police shortly after the murders. Flowers told investigators that he had worked at Tardy Furniture for about three days at the beginning of July 1996. On his last day, Flowers improperly loaded large tractor batteries, and they fell off the truck and were damaged. Bertha Tardy told Flowers that the cost of the damaged batteries would be deducted from his paycheck. Flowers failed to return to work after the incident. After not reporting to work for several days, Flowers called Bertha Tardy and asked if he still had a job. Bertha Tardy told Flowers that he no longer had a job and that the majority of his paycheck was "covered up with [the] batteries." Flowers never stated that he was angry with Bertha Tardy for losing his job.

¶ 63. Flowers is correct that the State did not provide direct evidence of any anger toward the Tardy Furniture employees, but the State did provide evidence that Flowers had lost his job at Tardy Furniture and had his paycheck reduced as a result of the damaged batteries. A reasonable juror could conclude from that evidence—and it is in the jury's province to draw such inferences if reasonable—that Flowers had a motive to rob Tardy Furniture and kill four employees.

*See Howell v. State*, 860 So.2d 704, 739 (¶ 125) (Miss. 2003) ("It is within the jury's province to draw reasonable inferences from facts based on experience and common sense.") (citing *Lewis v. State*, 573 So.2d 719, 723 (Miss. 1990)). The State's evidence supported the contention that Flowers had a motive.

¶ 64. Next, Flowers contends that the State's theory hinged on proving that Flowers knew he would find a gun in Simpson's car the morning of the murders, and he claims the State failed to prove that. He cites Simpson's testimony that Flowers did not know Simpson's gun was in his car on the morning of the murders:

> Q. Your testimony was you did not recall agreeing and saying there was no way that Curtis Flowers would have known that gun was in the car that particular morning.
>
> A. No. He, he didn't know it.
>
> Q. He did not know it.
>
> A. He did not know it.

Although Simpson stated at that point in his testimony that Flowers did not know the gun was in his car on the morning of the murders, Simpson had first testified that Flowers had seen the gun in Simpson's car previously. In a followup question regarding whether Flowers knew the gun was in his car that morning, Simpson confirmed that Flowers had seen the gun in his car before.

Q. So you had known [Flowers] pretty much forever.

A. Yes, sir. Yes, sir.

Q. Did he know that you had this pistol?

A. Yes, he did.

Q. Had he seen it in your car before?

A. Yes, sir.

. . .

Q. You were asked . . . whether or not there was any way he knew the gun was in there that morning and your answer was that it wasn't; is that right?

A. That's right.

Q. But you were also asked how [Flowers] knew you kept a gun in your car, I believe. How did [Flowers] know you had had a gun in your car? Had he seen it in there before?

A. Yes, sir, he had.

¶ 65. Because Flowers previously had seen Simpson's gun in his car, the evidence supports the contention that Flowers knew he would find the gun in Simpson's car the morning of the murders. The jury, as "the ultimate finder of fact," is responsible for considering the evidence and weighing the credibility of witnesses, and the Court will not reweigh the evidence on appeal. *Conley v. State*, 790 So.2d 773, 807 (¶ 13) (Miss. 2001) ("We do not have the task of re-weighing the

facts in each case and going behind the verdict of the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible."). Whether the jury believed that Flowers knew Simpson kept a gun in his car was one piece of evidence for the jury to consider.

¶ 66. Flowers also attacks the credibility of the witnesses who placed him walking between his home, Angelica Garment Factory, and Tardy Furniture the morning of the murder. He asserts that the $30,000 reward for information lured the witnesses to testify. Several witnesses testified that they were aware a reward was being offered for information.[5] Some witnesses were not asked about the reward. Two of Flowers's fact witnesses, Latarsha Blissett and Kittery Jones, testified that investigators had implied that they would receive the reward if they provided statements implicating Flowers. The reward was never given. The jury heard testimony related to the reward, and Flowers's counsel argued during closing argument that investigators allegedly had tried to entice witness statements by offering the reward. The issue was within the jury's province of determining credibility. *See Taylor*, 110 So.3d at 784 (¶ 29).

¶ 67. Flowers also claims that testimony from people who saw him on the morning of the murders is not credible because the witnesses' testimony contains

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[5] The State's witnesses who testified that they knew about the reward were: Patricia Odom, Katherine Snow, James Kennedy, Mary Fleming [sic], and Clemmie Fleming [sic].

"irreconcilable differences." One difference Flowers cites is the witnesses' descriptions of his clothing. One witness testified that Flowers was wearing black windsuit pants; another said Flowers had on brown pants; and another thought Flowers wore white shorts. Flowers also points out that the times at which the witnesses claimed to have seen him at various locations in Winona overlap. For example, James Kennedy testified that he saw Flowers in front of his home at 7:15 a.m., but Katherine Snow said that she saw Flowers at Angelica at 7:15. Inconsistency in witness testimony is an issue of credibility for the jury. "It is within the jury's province to determine the weight and credibility to give to the evidence, resolving all conflicts in the evidence." *Taylor*, 110 So.3d at 784 (¶ 29).

¶ 68. Finally, Flowers claims that the physical evidence linking him to the murders lacks probative value. First, he argues that the bloody shoeprint found at the scene does not connect him to the crime, because another person could have come into the store after the murders and stepped on the bloody floor. His assertion lacks merit. The shoeprint was from a size ten-and-a-half Fila Grant Hill tennis shoe. Flowers wore a size ten-and-a-half shoe. A shoebox for size ten-and-a-half Fila Grant Hill tennis shoes was found in Flowers's girlfriend's home. Witnesses testified that they had seen Flowers wearing Fila Grant Hill shoes. Second, Flowers contends that the gunshot residue particle found on his hand has no probative value, claiming that it could have come from another source. As discussed above, Joe Andrews, a forensic scientist, testified that

the gunshot residue found on Flowers's hand could prove one of three things: (1) he had discharged a weapon; (2) he had been in close proximity to a discharged weapon; or (3) he had handled an object that had gunshot residue on it. Although the gunshot residue could have come from another source (for example, coming in contact with an item at the police station), one alternative was that Flowers actually fired a weapon. Thus, the evidence does have some probative value.

¶ 69. The State responds to Flowers's claim that the evidence was insufficient by citing the following evidence linking Flowers to the murders: Flowers was fired from Tardy Furniture and was told he would not receive pay for his days worked. Flowers was seen standing next to Simpson's car—where the gun used in the murders was located—on the morning of the murders. Numerous witnesses saw Flowers walking to and from Tardy Furniture on the morning of the murders. The shoeprint found at the crime scene matched Flowers's shoe size and matched a pair of shoes he had been seen wearing. Flowers tested positive for gunshot residue. The only paperwork that had been disturbed at Tardy Furniture was Flowers's paycheck and timecard. Cash was found hidden in Flowers's headboard after the murders. Hallmon testified that Flowers had confessed to committing the murders. When the evidence is viewed as a whole and in the light most favorable to the State, we conclude that any rational trier of fact could have found that the State had proved the

essential elements of capital murder beyond a reasonable doubt. Accordingly, the issue is without merit.

## V. Whether Flowers's right to a fair trial, as guaranteed by Mississippi law and the Fourteenth Amendment to the United States Constitution, was violated by the prosecution referencing facts not in evidence during the culpability phase closing argument.

¶ 70. Flowers claims that the prosecution improperly argued facts not in evidence during its culpability phase closing argument. During closing arguments, attorneys may "fairly sum up the evidence," comment on facts in evidence, and "draw whatever deductions and inferences" seem proper from the facts. *Rogers v. State*, 796 So.2d 1022, 1027 (¶ 15) (Miss. 2001); *Bell v. State*, 725 So.2d 836, 851 (¶ 40) (Miss. 1998) (citations omitted). We apply the following standard of review to attorney misconduct during opening statements and closing arguments: "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d 659, 661 (¶ 7) (Miss. 2001) (citing *Ormond v. State*, 599 So.2d 951, 961 (Miss. 1992)).

¶ 71. "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow." *Goodin v. State*, 787 So.2d 639, 645 (¶ 18) (Miss. 2001) (citing *Acevedo v. State*, 467 So.2d 220, 226 (Miss. 1985)).

However, we have held that, even if a prosecutor's statements during closing arguments are inconsistent with the facts, reversal is not warranted if the statements do not rise to the level necessary to endanger the impartial administration of justice and the fairness of the trial. *Pitchford v. State*, 45 So.3d 216, 233 (¶ 62) (Miss. 2010) (quoting *Goodin*, 787 So.2d at 645 (¶ 18)). In *Pitchford*, the prosecutor said that the defendant "went to the sheriff's department the same morning of the murder and he admitted it." *Pitchford*, 45 So.3d at 233 (¶ 62). The testimony, however, was that the defendant "talked to" an investigator. *Id.* Despite the inconsistency, the Court held that the statement did not result in an unfair trial. *Id.*

¶ 72. Flowers claims that, during closing argument, the prosecution misstated facts about: (1) the time Sam Jones discovered the victims at Tardy Furniture; (2) Flowers's motive; (3) Porky Collins's response to the photo arrays; and (4) the location of the victims at the crime scene. The State correctly asserts that Flowers did not object contemporaneously to the statements during closing argument. Generally, even in death penalty cases, "the failure to object to the prosecution's statements in closing argument constitutes a procedural bar." *Ross I*, 954 So.2d at 1001 (¶ 71) (citing *Spicer v. State*, 921 So.2d 292, 309 (Miss. 2006); *Williams v. State*, 684 So.2d 1179, 1203 (Miss. 1996)). However, in some cases, we have considered the merits of the argument even where the defendant failed to object contemporaneously. *See Ross I*, 954 So.2d at 1002 (¶ 71) (citing cases).

¶ 73. In *Flowers II*, we recognized plain error for misstatements by the prosecution in closing arguments. *Flowers II*, 842 So.2d at 550–56 (¶¶ 52–74). Therefore, because we found plain error on a similar issue in *Flowers II*, we proceed under a plain error analysis for the purpose of a thorough analysis. *Foster v. State*, 639 So.2d 1263, 1289 (Miss. 1994) ("defendant who fails to make a contemporaneous objection must rely on plain error to raise the assignment on appeal") (citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss. 1986)). To reverse under the plain error doctrine, an error must have occurred and that error must have "resulted in a manifest miscarriage of justice" or "seriously affect[ed] the fairness, integrity[,] or public reputation of judicial proceedings." *Conners v. State*, 92 So.3d 676, 682 (¶ 15) (Miss. 2012) (quoting *Brown v. State*, 995 So.2d 698, 703 (¶ 21) (Miss. 2008)).

### A. Sam Jones's Arrival at Tardy Furniture

¶ 74. Flowers claims that, during closing argument, the State misrepresented Sam Jones's testimony regarding the timeline of events on the morning of the murders. Jones died prior to Flowers's 2010 trial, so his testimony from the 2007 trial was read into evidence. Jones initially testified that he arrived at Tardy Furniture between 9:15 and 9:30 a.m. When the State questioned Jones about the timeline, the State's attorney misstated Jones's arrival time as being closer to 10:00 a.m. The State's attorney asked, " . . . when you got to the store, that was going to be closer on up to 10 o'clock,

wasn't it?" Flowers's counsel objected to leading, but the judge overruled the objection. However, Jones never responded to the question. During closing argument, the State discussed the timeline and the attorney said: "Mr. Sam Jones came into the store slightly after 10:00 on the morning of the 16th and discovered the bodies." Flowers claims the statement was prejudicial because it skewed the timeline in the State's favor. Both Porky Collins and Clemmie Flemming testified that they had seen Flowers near Tardy Furniture around 10:00 a.m. Flowers claims that, if Jones's testimony that he arrived at the store between 9:15 and 9:30 had been described accurately, it would have raised a question in the jurors' minds about what Flowers was doing near the murder scene thirty to forty-five minutes after the murders could have occurred.

¶ 75. The State responds that, although Jones did not testify to arriving at the store at 10:00 a.m., other evidence presented at trial supported that position. For example, the 911 call reporting the murders was placed at 10:20 a.m., and Jones testified that he was in Tardy Furniture for ten to fifteen minutes before going to a nearby business to call for help. So, working backward, the conclusion could be drawn that Jones arrived at Tardy Furniture closer to 10:00 a.m., rather than 9:15 or 9:30. Further, the State claims that any misstatement relating to the time Jones arrived was harmless error, and the error was cured with the following comments by defense counsel in its closing statement:

> [Sam Jones] came in and you know, his testimony, I looked it up as they were saying that. His original testimony was he might have gotten there, started his voyage to go in to—as early as 9:00. He, he thought maybe he got there closer to 9:30. But we know from the police that the call came in at 10:20. And if you will remember, Mr. Jones also told you he thought it might have been 15 minutes before he recovered himself enough to go and actually make the report. So there is a bunch of time in there.
>
> Sam Jones did not testify that he arrived at Tardy Furniture at 10:00 a.m. However, a reasonable inference could be drawn from the other evidence, including the 911 call, that Jones may have arrived closer to 10:00. Defense counsel's summary of the timeline in closing and the reasonable inference that could be drawn from the evidence as a whole preclude a finding of plain error on the issue.

### B. Flowers's Motive

¶ 76. Next, Flowers claims that the following statement by the prosecutor about Flowers's alleged motive was not based on facts in evidence:

> The investigators learned pretty quickly when they asked who in the world could have had some reason, some motive, some anything to attack four people like this.
>
> Have you had anybody that's had beef with the store? Just one. Well, that doesn't mean he

> did this though, does it? No. But you check that out. You look at him. And in the course of deciding what, if anything, Curtis Flowers had to do with this crime.

In his brief, Flowers claims that no evidence was presented to support the State's theory that Flowers was angry about being fired. To the contrary, the State identified several facts that supported the contention that Flowers "had beef" with Tardy Furniture: Flowers lost his job days before the murders. Bertha Tardy deducted the cost of damaged inventory from Flowers's paycheck. Police Chief John Johnson testified that the Tardy family considered Flowers a threat and that "they were concerned about their safety dealing with him." Investigator Jack Matthews testified Flowers was the only employee who had been fired from Tardy Furniture in the last few years and was the only person with whom they had had any problems. Doyle Simpson testified that he had heard that Flowers had "problems" with Tardy Furniture. A reasonable inference could be drawn from the evidence that Flowers had ill will toward Tardy Furniture. We cannot say that the State's comment during closing rose to the level of plain error.

### C. Porky Collins's Response to the Photo Lineups

¶ 77. In his third assignment of error, regarding alleged misstatements by the prosecution, Flowers claims that the prosecutor misrepresented Porky Collins's

response to the photo lineup that included Doyle Simpson's photograph. The misrepresentation was prejudicial to Flowers's defense, he claims, because his defense was based partially on the theory that Simpson committed the murders. Collins testified that he did not remember if he had identified Simpson as one of the men he had seen arguing outside Tardy Furniture. Notes taken by an investigator during the photo arrays provided that Collins had said that two of the individuals resembled one of the men but that the "hairline was further back." Investigator Wayne Miller testified that Collins had pointed to Simpson during the photo array and said he looked like the person, but he could not be positive. Collins was shown a second array of photos, and he definitively identified Flowers.

¶ 78. During closing argument, the State's attorney said the following about Collins's identification: "He said the guy ain't there. They took another six photographs and said look at this second set. He said that's him right there. . . . You know, see if he is in there. No, he is not. Is he in the second group? Yeah. That's him right there." The State correctly reiterated that Collins had identified Flowers in the second photo array as one of the men he had seen arguing outside Tardy Furniture. While the State's statement that Collins had said "the guy ain't there" was not an accurate representation of Collins's response to the first photo array, the reality is that Collins did not identify Simpson. He said he could not be sure. He pointed to Simpson's photograph in the first array and said he "looked like" the man he saw but he was "unable to be positive."

However, when Collins saw Flowers in the second array, he was positive. The prosecutor's statement was slightly inconsistent with the facts, but we cannot say that the comment rose to the level of plain error.

### D. Location of the Victims at the Crime Scene

¶ 79. Flowers contends that the prosecutor incorrectly described the location of the victims at the crime scene. The prosecutor stated during closing argument that Sam Jones had discovered "all four victims basically laying in a pile, in a group right at the front counter in Tardy Furniture Store." The evidence presented at trial, however, showed that three of the victims were lying a few feet apart from one another, while the fourth victim was a considerable distance away. Flowers argues that the prosecutor's statement was prejudicial because it aided in undercutting the theory that the murders were committed by more than one person. Essentially, Flowers claims that the idea of four victims "piled together" aligns with a one-person crime, whereas victims spread across a larger area paints the picture of a two-man crime. The State admits that the "lying in a pile" statement was incorrect, but the State points out that three of the four victims were lying close to one another. The State asserts that the statement did not prejudice Flowers. As previously mentioned, Flowers did not present the "two-man crime" theory to the jury. And Flowers does not claim that the prosecutor's statement prejudiced him in any other way. Applying the plain error doctrine, the statement

may have been an error, but we cannot say that it resulted in a manifest miscarriage of justice or resulted in an unfair trial. *See Conners*, 92 So.3d at 682 (¶ 15).

### E. Conclusion

¶ 80. We recognize that, in *Flowers II*, the prosecution's misstatement of facts during closing argument was one basis for reversal. *Flowers II*, 842 So.2d at 556 (¶ 74). In that appeal, Flowers cited approximately fourteen alleged misstatements. *Id.* at 555 (¶ 68). Taken together, the cumulative effect of the misstatements, along with several other errors, warranted reversal. *Id.* at 556, 564 (¶¶ 74, 104). In today's case, Flowers cites four statements made during closing argument that he claims were not supported by the evidence. The prosecutor's comments regarding Jones's arrival time, Flowers's having "beef" with the store, and Collins's identification were supported by the evidence and/or were proper "deductions and inferences" drawn from the facts. *Rogers*, 796 So.2d at 1027 (¶ 15); *Bell*, 725 So.2d at 851 (¶ 40). The statement about the bodies being piled up was a misstatement, but it does not satisfy the standard for plain error. We reiterate that Flowers failed to object to the statements during closing, therefore, we apply the plain error doctrine on appeal. Plain error is not present, as we have only one misstatement, which did not result in a manifest miscarriage of justice or adversely affect the fairness of the proceedings. *Conners*, 92 So.3d at 682 (¶ 15). The issue is without merit.

## VI. Whether the jury selection process violated Flowers's fundamental constitutional rights protected by the Sixth and Fourteenth Amendments, and whether the trial court erred in denying Flowers's *Batson* claims.

¶ 81. Flowers claims that the State exercised its peremptory strikes in a racially discriminatory way by striking five African-American venire members after employing disparate questioning and citing pretextual reasons for the strikes. As previously mentioned, the Supreme Court issued an order granting Flowers's petition for a writ of certiorari and remanding the case "for further consideration in light of *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737, [195 L.Ed.2d 1] (2016)." *Flowers*, 136 S.Ct. at 2157.

¶ 82. An order granting, vacating, and remanding a lower court decision does not amount to a final determination on the merits. *Kenemore v. Roy*, 690 F.3d 639, 641 (5th Cir. 2012). Such an order "does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.* at 642. The Supreme Court often vacates a judgment and remands a case when it "believes that the lower court should give further thought to its decision in light of an opinion of [the Supreme] Court that (1) came after the decision under review and (2) changed or clarified the governing legal principles in a way that could

possibly alter the decision of the lower court." *Flowers*, 136 S.Ct. at 2157 (Alito, J., dissenting).

¶ 83. The Court afforded Flowers and the State an opportunity to submit supplemental briefs on remand in accordance with the Supreme Court's order. Rather than point out how the Court should give further thought to its decision in light of *Foster* or explain how *Foster* changed or clarified the governing legal principles in a way that possibly could alter our decision, Flowers essentially re-urges the arguments he had raised in his most recent appeal.

¶ 84. Flowers contends that "[f]rom the beginning," the State's lead prosecutor Doug Evans engaged in a "relentless exclusion of African Americans from the juries[.]" Flowers's petition for certiorari to the Supreme Court raised the following question: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" Flowers argues that "the Supreme Court's remand for reconsideration requires this Court to reevaluate the evidence of pretext in light of the prosecutor's history of discrimination and dishonesty."

¶ 85. Flowers points out that, during his second trial, the trial court disallowed one of Evans's strikes because it had found it to be racially motivated. Flowers also points out that the Court said that Flowers's third trial presented us with as strong a *prima facie* case of racial discrimination as we had ever seen in the

context of a *Batson* challenge. *Flowers III*, 947 So.2d at 935.

¶ 86. In *Flowers III*, the Court held that the prosecutor had violated *Batson* because the peremptory challenge exercised against juror Vickie Curry was clearly pretextual as there was no basis in the record for two of the grounds proffered by the prosecutor. *Id.* at 936. Moreover, the third ground was based on a relationship between Curry and Flowers that was "tenuous at best." *Id.* at 936. The Court also noted the trial court's erroneous statement that "the State has a right to exercise a challenge based on some of the answers from the other jurors as far as their peremptory challenge goes." *Id.* The Court also held that the prosecutor's actions in striking juror Connie Pittman were "equally specious, as there [was] absolutely no evidence in the record to support the [the prosecutor's] proffered reason for striking her." *Id.* The Court classified the strikes of three other jurors as "suspect, as an undertone of disparate treatment exist[ed] in the State's voir dire of [the other three] individuals." *Id.* The Court concluded that, "[a]fter carefully reviewing the record before this Court and the applicable law, we find that the State engaged in racially discriminatory practices during the jury selection process and that the trial court committed reversible error in upholding the peremptory strikes exercised against Vickie Curry and Connie Pittman." *Id.* at 939.

¶ 87. As an initial matter, *Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations. Rather, the Supreme Court's

decision in *Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's troubling jury selection file, which had a shocking focus on race. Nonetheless, we analyze *Foster* on our own to look for other issues that might place our original opinion in *Flowers IV* in error.

¶ 88. In *Foster*, petitioner Timothy Foster claimed that the prosecution used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury in his trial for capital murder, in violation of *Batson*. *Foster*, 136 S.Ct. at 1742. The trial court denied his claim, and the Georgia Supreme Court affirmed. *Id.* Foster renewed his *Batson* claim in a state habeas proceeding. *Id.* While the habeas proceeding was pending, Foster obtained copies of the file used by the prosecution during his trial through the Georgia Open Records Act. *Id.* at 1743–44.

¶ 89. The prosecution's jury selection file was replete with documents referencing race, including: (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in green, with a legend indicating that the green highlighting "represents Blacks"; (2) a draft of an affidavit prepared by an investigator at the request of the prosecutor, comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes identifying three black prospective jurors as "B# 1," "B# 2," and "B# 3"; (4) a typed list of qualified jurors with "N" (for "no") appearing next to the names of all five black

prospective jurors; (5) a handwritten document titled "definite NO's" listing six names, including the names of all five qualified black prospective jurors; (6) handwritten document titled "Church of Christ" with notation that read: "NO. No Black Church"; and (7) the questionnaires filled out by several of the prospective black jurors, on which each juror's response indicating his or her race had been circled. *Id.* at 1744.

¶ 90. The state habeas court considered the prosecution's jury selection file but denied relief. *Id.* at 1745. The Georgia Supreme Court likewise denied relief, concluding that Foster's *Batson* claim was without merit because he had failed to demonstrate purposeful discrimination. *Id.* at 1745. The Supreme Court granted certiorari. *Id.* The Supreme Court reemphasized the familiar principle that "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008)). The Supreme Court also reaffirmed the well settled, three part process established in *Batson* for determining when a strike is discriminatory:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must

> determine whether the defendant has shown purposeful discrimination.

*Id.* (quoting *Snyder*, 552 U.S. at 476–477, 128 S.Ct. 1203).

¶ 91. The Supreme Court addressed only *Batson*'s third step because it was undisputed that Foster had demonstrated a *prima facie* case and that the prosecutors had offered race-neutral reasons for their strikes. *Id.* at 1747. The third "step turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." *Id.* (quoting *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203).

¶ 92. Despite uncertainty about the background of particular jury selection notes obtained by Foster, the Supreme Court refused to blind itself to their existence. *Id.* at 1748. The Supreme Court "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 136 S.Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). "As [the Supreme Court has] said in a related context, 'determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available.'" *Id.* (quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). "At a minimum, [the Supreme Court was] comfortable that all documents in the file

were authored by someone in the district attorney's office. Any uncertainties concerning the documents [were] pertinent only as potential limits on their probative value." *Foster*, 136 S.Ct. at 1748.

¶ 93. Foster focused his *Batson* claim on the strikes of two black prospective jurors, Marilyn Garrett and Eddie Hood. *Id.* at 1748. The Supreme Court analyzed the prosecution's justifications for striking Garrett and Hood.

¶ 94. The Supreme Court determined that the prosecution's reasoning for striking Garrett was "not grounded in fact." *Id.* at 1748–49. Furthermore, the Supreme Court also discovered that the prosecution had made misrepresentations because several of the prosecution's reasons for why he struck Garrett were contradicted by the record. *Id.* at 1749–50. The Supreme Court also determined that other explanations given by the prosecution, while not explicitly contradicted by the record, were "difficult to credit" because the prosecution had accepted white jurors with the same traits that allegedly rendered Garrett an unattractive juror. *Id.* at 1750.

¶ 95. As for the other juror, Hood, the Supreme Court said that the prosecution's principal reasons for striking him "shifted over time, suggesting that those reasons may be pretextual." Moreover, the Supreme Court concluded that the prosecution's justifications could "only be regarded as pretextual" because the justifications were "implausible" and "fantastic." *Id.* at 1752–53 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 339,

123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (holding that credibility can be measured by, among other factors, how reasonable, or how probable, the State's explanations are)). As for an alternative primary justification for striking Hood—his affiliation with the Church of Christ—the Supreme Court was persuaded by the record demonstrating that Hood's race was the true motivation for the strike, not his religious affiliation. *Foster*, 136 S.Ct. at 1753. The Supreme Court noted the prosecution's multiple mischaracterizations of the record that other prospective jurors, who were members of the Church of Christ, had been struck. *Id.* at 1753. The Supreme Court also said that "[t]he prosecution's file fortifies our conclusion that any reliance on Hood's religion was pretextual." *Id.* The Supreme Court also determined that "[m]any of the State's secondary justifications similarly come undone when subjected to scrutiny." *Id.*

¶ 96. The Supreme Court proceeded with its *Batson* analysis: "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Foster*, 136 S.Ct. at 1754 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)). "With respect to both Garrett and Hood, such evidence is compelling." *Id.* at 1754. Not only was the evidence "compelling," there were "also the shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file." *Id.* "Considering all of the circumstantial

evidence that 'bear[s] upon the issue of racial animosity,' [the Supreme Court [was] left with the firm conviction that the strikes of Garrett and Hood were 'motivated in substantial part by discriminatory intent.'" *Id.* (quoting *Snyder*, 552 U.S. at 478, 485, 128 S.Ct. 1203).

¶ 97. The Supreme Court insisted that the contents of the prosecution's file plainly belied the State's claim that it had exercised its strikes in a "color-blind" manner. *Id.* In fact, the Supreme Court described the number of references to race in the prosecution's file as "arresting." *Id.* The Supreme Court held that "the focus on race in the prosecution's file plainly demonstrat[ed] a concerted effort to keep black prospective jurors off the jury." *Id.* The Supreme Court concluded that the "prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury[.]" *Id.* The Supreme Court reversed the judgment and remanded the case for further proceedings because "[t]wo peremptory strikes on the basis of race are two more than the Constitution allows." *Id.*

¶ 98. After reviewing Flowers's supplemental briefs, the only aspect of *Flowers VI* that Flowers takes issue with as it relates to *Foster* is that the Court did not expressly refer to the prosecutor's past *Batson* violations in our analysis of Flowers's *Batson* claim. Flowers claims that the Court did not follow the "totality-of-the-circumstances approach" used in *Foster*; rather the Court confined itself to evaluating each piece of evidence of pretext in isolation, affording the prosecutor the benefit of the doubt where the evidence was

ambiguous. Flowers argues "although [Doug] Evans had distinguished himself as an especially willful and recalcitrant *Batson* violater [sic]," the Court "omitted that well-documented history from its assessment of the credibility of his facially neutral reasons."

¶ 99. "[T]he State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89, 106 S.Ct. 1712. The Supreme Court in *Foster* reaffirmed the well established, three step process for determining when a strike is discriminatory as set out in *Batson*. *Foster*, 136 S.Ct. at 1747. When a defendant challenges a peremptory strike under *Batson*, the defendant must first "establish a *prima facie* case of discrimination in the selection of jury members." *Thorson v. State*, 721 So.2d 590, 593 (¶ 2) (Miss. 1998) (citing *Berry v. State*, 703 So.2d 269, 294 (¶¶ 94–96) (Miss. 1997) (citing *Batson*, 476 U.S. at 96–98, 106 S.Ct. 1712)). Then, the burden shifts to the State to demonstrate that the juror was struck for a nondiscriminatory, or race neutral, reason. *Thorson*, 721 So.2d at 593 (¶ 2). The defendant then has the opportunity to rebut the State's reason. *Id.* Finally, considering all of the evidence, the trial court must determine if the State "engaged in purposeful discrimination" or if the strike was made for a race neutral reason. *Id.* In other words, the trial court must determine whether the race neutral reasons given by the State were credible or merely a pretext for discrimination.

¶ 100. The Court has identified five indicia of pretext that should be considered when analyzing the race neutral reasons for a peremptory strike:

> (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to voir dire as to the challenged characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits.

*Manning v. State*, 765 So.2d 516, 519 (¶ 9) (Miss. 2000) (quoting *Mack v. State*, 650 So.2d 1289, 1298 (Miss. 1994)).

¶ 101. *Foster* did not alter the great deference given to trial judges. The third step of *Batson* "turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203). We give great deference to the trial court's determinations under *Batson* and will reverse only if the trial court's decision is clearly erroneous or against the overwhelming weight of the evidence. *Berry v. State*, 802 So.2d 1033, 1037 (¶ 9) (Miss. 2001); *Thorson*, 721 So.2d at 593 (¶ 4). "The trial court has a pivotal role in evaluating *Batson* claims." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). We have expounded on the standard of review afforded to trial judges regarding *Batson* findings as follows:

> When a *Batson* issue arises, the trial judge acts as the finder of fact. *Berry v. State*, 703 So.2d 269, 295 (Miss. 1997). . . . The race neutral explanations must be viewed in the light most favorable to the trial court's findings. *Id.* Trust is placed in a trial judge to determine whether a discriminatory motive drives the reasons given for striking a potential juror. *See Webster v. State*, 754 So.2d 1232, 1236 (Miss. 2000). The determination of discriminatory intent will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed. *Batson*, 476 U.S. at 98, 106 S.Ct. 1712[.] Thus, trial courts are given great deference in their findings of fact surrounding a *Batson* challenge. *Lockett v. State*, 517 So.2d 1346, 1350 (Miss. 1987). . . .

*Walker v. State*, 815 So.2d 1209, 1215 (¶ 12) (Miss. 2002).

¶ 102. "Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). "[T]he best evidence of discriminatory intent often will be the demeanor of the attorney who exercises the challenge[.]" *Id.* Moreover, race neutral reasons for peremptory challenges often invoke a juror's demeanor, making the trial court's firsthand observations of even greater importance. *Id.* The trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor credibly can be said to

have exhibited the basis for the strike attributed to the juror. *Id.* The trial court's "determinations of credibility and demeanor lie peculiarly within a trial judge's province[.]" *Id.* (citations and quotations omitted).

¶ 103. "[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Foster*, 136 S.Ct. at 1748 (citing *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). On the same note, "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial evidence of intent as may be available." *Foster*, 136 S.Ct. 1737, 1748 (citing *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. 555).

¶ 104. The Montgomery County clerk summoned a special venire of 600 potential jurors for Flowers's sixth trial. The initial venire consisted of forty-two percent African Americans and fifty-five percent whites.[6] After for-cause challenges, the venire consisted of twenty-eight percent African Americans and seventy-two percent whites. During jury selection, the State accepted the first African-American juror, then exercised six peremptory strikes, five of which were against African-American venire members. At the point when five African Americans were struck by the State, the trial court found that a *prima facie* case of discrimination existed. The State then provided race neutral

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[6] The remaining venire members did not identify their race on the juror questionnaire.

reasons for the five strikes, and Flowers's counsel offered rebuttals for the State's reasons. Ultimately, the trial court found that the State's reasons were credible.

¶ 105. Essentially, Flowers is asking the Court to reevaluate the credibility of Evans's race neutral explanations for striking African Americans in the sixth trial. However, as we explained in *Flowers VI*, "the determination of discriminatory intent will likely turn on a trial judge's evaluation of a presenter's credibility and whether an explanation should be believed." *Flowers VI*, 158 So.3d at 1047 (citing *Batson*, 476 U.S. at 98, 106 S.Ct. 1712).

¶ 106. Here, the trial court was asked on several occasions to consider historical evidence of *Batson* violations committed by Evans in previous trials of the case. Flowers's counsel even asked the trial court to preclude Evans from making peremptory strikes entirely based on his history of *Batson* violations in the case. Specifically, Flowers's counsel urged:

> And I would renew the motion with respect to—and I, I would now re-urge this, when I've not previously urged. We had in the last trial urged that should this jury—that the prosecutor be, be precluded from making peremptory strikes because so much of this—because there is the history that has been found by the Mississippi Supreme Court of racial discrimination in jury selection with respect to this case by this prosecution. It's happened actually—the predecessor in *Flowers II*, in Harrison County, found a *Batson* violation and

> ruled a strike by the State. So that in two proceedings and on the basis of what has been a persistent pattern of simply, you know, asking things that are clearly, if not flatly race or at least race-based[.]

The trial court responded to Flowers's counsel's request:

> And as far as the motion to prohibit the State from using peremptory challenges, there is no basis for that. Absolutely none. If the State looks at potential jurors and feels that they have right reasons for using peremptory challenges, that is their right. That is each sides [sic] gets to make peremptory challenges. But because *Flowers III* was reversed on *Batson* is certainly no grounds for saying that they should now be denied the right to use peremptory. The Supreme Court of this State has certainly never said that on a retrial you could not use peremptory challenges, nor has the United States Supreme Court ever said that. And so you're pulling that motion totally out of thin air and without any basis in law or in fact for making it. So it's denied.

¶ 107. Flowers's counsel continued to argue the history of *Batson* violations in support of the *Batson* claim at trial:

> And we think it is, therefore, pretextual specific and particularly in light under—of the history of race discrimination in jury selection in this district and in this particular case found by the Mississippi Supreme Court in

> *State v. Flowers* after the third trial, the first one in this district.

Indeed, the trial court was presented with and rejected Flowers's present argument that he had advanced at trial. Flowers argued to the trial court:

> And I think that that is in *Flowers III*, what the Supreme Court of Mississippi said was that when you are looking at *Batson*, you look at the totality of the circumstances and you go beyond little excuses. And that the danger, certainly, in *Flowers III* is to devolve—for the *Batson* challenging process, to devolve into an effort of uncovering and coming up with facially neutral reasons that are merely a mask for actually racially discriminatory reasons, the desire to bleach or—I suppose, if it were the other way around darken or make male or make female, the jury and that the Court, considering the totality of the circumstances, cannot simply express this distinction. This is based on the 14th Amendment Equal Protection Clause. And there is a huge body of equal protection civil litigation. It is referred to by the United States Supreme Court in *Snyder*, the most recent case in which a verdict was reversed on *Batson* in the United States Supreme Court. And basically, the situation is that you may go behind the facial neutrality if anything in the record suggests that one or more of the reasons may be either unconnected and related to what is really a material issue in this case and/or appears to have been pursued with more vigor in an attempt to

> uncover some excuse that is of less than universal relevance.

Again, Flowers's counsel ensured that the trial court consider the totality of the circumstances, including historical evidence of racial discrimination by the district attorney.

> Again, we would cite the totality of the circumstances and the apparent cherry picking of the African-American jurors for scrutiny and attention. And in light of the history of racial discrimination by this district attorney's office in this district, we would say the totality of the circumstances makes this a pretext for discrimination and attempt to look for race-neutral reasons for racially motivated peremptory striking.

¶ 108. The trial court not only considered Flowers's counsel's argument in its consideration of the totality of the circumstances; the *Flowers* Court also considered other circumstances showing that Evans did not have discriminatory intent. The trial court certainly considered circumstances surrounding the previous trials as evidenced by its response to Flowers's *Batson* claim:

> But you know full well from past experiences in this county because of the number of people that know Mr. Flowers, they know his parents, they know his brother, they know his sisters, and he I mean he has got a large number of siblings. And all of those people you know, I mean he is so well-known here that, you know, you've got a number of African-Americans

> that say I know him. I can't be fair. I know these people. I can't sit in judgment of their son. And there is there is no way to avoid that if this case is tried in this county. Because this is the same type things that, that occurred in the previous trials where he had so many people that knew him. You know, I don't—I hadn't kept a running count of anything in here but, you know, there is nothing that has—that has—no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family.

¶ 109. The prior adjudications of the violation of *Batson* do not undermine Evans's race neutral reasons as the despicable jury selection file in *Foster* had undermined the prosecution's race neutral explanations. We cannot say that the exceptional circumstances discussed in *Foster* are present in today's case so as to prevent the Court from deferring to the trial court's factual determinations. Moreover, we cannot conclude that the trial court's factual findings were clearly erroneous.

¶ 110. Flowers's post-remand briefs spend far more time re-urging the arguments from his original appellate brief than addressing *Foster* itself. Accordingly, Flowers appears to rely on *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (*Miller-El II*) instead. In *Miller-El II*, the Supreme Court held "the appearance of discrimination [was] confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to

exclude black venire members from juries at the time Miller-El's jury was selected." *Id.* at 253, 125 S.Ct. 2317. The Supreme Court said, "[w]e kn[e]w that for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries[.]" *Id.* at 263, 125 S.Ct. 2317. The evidence of a specific policy of past discrimination in *Miller-El II* significantly differs from the evidence before the Court. The Court does not find Evans's past two adjudicated *Batson* violations overcome the deference owed to the trial judge's factual findings on which the Court's affirmance relies. The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*. *Miller-El II*, 545 U.S. at 266, 125 S.Ct. 2317 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror.").

¶ 111. We turn to address Flowers's arguments raised on appeal. Flowers claims that the State exercised its peremptory strikes in a racially discriminatory way by: (1) disparately questioning African-American jurors as compared to white jurors; (2) responding differently to African-American jurors' voir dire answers as compared to answers of white venire members; and (3) mischaracterizing the voir dire responses of African-American jurors. We do not ignore the historical evidence of racial discrimination in the

previous trials in our consideration of Flowers's arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*.

### A. Disparate Questioning

¶ 112. Flowers claims that the questioning of African-American and white jurors was so "starkly different" that the questioning led to purposeful discrimination. First, Flowers asserts that the State asked potential African-American jurors more questions during individual voir dire than potential white jurors. Flowers claims that all African Americans who were struck by the State were asked more than ten questions. That statement is not supported by the record. For example, the State asked Carolyn Wright, an African American against whom the State exercised a peremptory strike, only three questions. However, overall, the State did ask more questions of African-American jurors than of potential white jurors. The State responds that more questions were asked only when a potential juror's answers to voir dire questions were unclear or needed further elaboration. Disparate questioning is evidence of purposeful discrimination. *Miller-el* [sic] *v. Cockrell*, 537 U.S. 322, 344, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Manning*, 765 So.2d at 520 (¶ 15). However, evidence of disparate questioning alone is not dispositive of racial discrimination. *Hughes v. State*, 90 So.3d 613, 626 (¶ 37) (Miss. 2012); *Manning*, 765 So.2d at 520 (¶ 15); *Berry*, 802 So.2d at 1039 (¶ 20).

¶ 113. Second, Flowers claims that the State did not question white venire members about their relationships with defense witnesses even though African-American jurors were extensively questioned about similar relationships. To support his argument, Flowers claims that, during voir dire examination by the trial court, four white venire members—Larry Blaylock, Harold Waller, Marcus Fielder, and Bobby Lester—stated that they knew defense witnesses. The record reveals that the potential jurors knew members of law enforcement, the Tardy family, and the victims; but they did not know members of the Flowers family. Of the white jurors who survived for-cause challenges, five knew members of Flowers's family. Four of them knew only one member of Flowers's family; the State did not follow up with them. Pamela Chesteen knew Flowers's father, mother, sisters, and a cousin. The State did not question Chesteen about the relationships during voir dire; however, the trial court asked Chesteen whether the relationships would affect her ability to serve as a juror, and she said they would not. Several African-American venire members were questioned about their relationships with Flowers's family, as will be discussed in detail in the following section. However, the State did not question all potential African-American jurors about their relationships with persons involved in the case. For example, Alexander Robinson, an African American who was selected to be a juror, stated that he knew Flowers's brother, but the State did not question Robinson about that relationship.

¶ 114. The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record. Most of the followup questions pertained to the potential juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial. The jurors who had heard little about the case, who said they would not be influenced by what they had heard, and who said they would not be influenced by relationships were asked the fewest questions. The jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty were asked more questions. Those issues are appropriate for followup questions.

¶ 115. We have held that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Howell v. State*, 860 So.2d at 726 (¶ 67) (quoting *Ballenger v. State*, 667 So.2d 1242, 1250 (Miss. 1995)). "The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors." *Howell*, 860 So.2d at 727 (¶ 70) (quoting *Stevens v. State*, 806 So.2d 1031, 1062 (¶ 140) (Miss. 2001)). The trial judge participated in voir dire, asking his own questions when necessary. Flowers was given ample opportunity to question jurors, rehabilitate jurors, and make challenges. That he had these opportunities is evidence of a fair and proper jury selection process. *See*

*Howell*, 860 So.2d at 726 (¶ 69); *Stevens*, 806 So.2d at 1062 (¶ 139). There is no evidence of discrimination based on the number of questions asked alone.

### B. Disparate Treatment of Individual Venire Members

¶ 116. Flowers also contends that the State: (1) responded differently to African-American jurors' voir dire answers compared to the answers of white venire members, and (2) mischaracterized the voir dire responses of African-American jurors. For the purpose of our analysis, the two issues are addressed together by discussing the African-American venire members who were struck from the venire by the State's use of peremptory strikes. We address the State's race neutral reasons for striking the jurors, as well as Flowers's arguments regarding each, which includes his contentions that the State mischaracterized the voir dire responses of the jurors and responded differently to them.

#### 1. Carolyn Wright

¶ 117. The State gave the following reasons for its peremptory strike of Carolyn Wright: (1) she knew several defense witnesses; (2) she was sued by Tardy Furniture for an overdue account; and (3) she had worked with Archie Flowers Sr. at Walmart. At the *Batson* hearing, Flowers offered rebuttals for the State's reasons, but the trial court held that the State's

reasons for striking Wright were race neutral. The trial court summed up its finding by stating:

> If the only reason the State offered was that she knows some of these defense witnesses, then there might be something there. But the fact is knowing these defense witnesses that you're intending to call, plus the fact that Tardy Furniture had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her.

¶ 118. One reason the State gave for striking Wright was that she knew multiple defense witnesses. In fact, Wright knew a total of thirty-four people who were involved with Flowers's case. Flowers argues that striking Wright because she knew several potential witnesses was pretextual because the State did not strike white jurors who were acquainted with multiple people involved in the case. Specifically, Flowers points to Pamela Chesteen, who knew thirty-one people involved in the case; Harold Waller, who knew eighteen people involved in the case; and Bobby Lester, who knew twenty-seven people involved in the case. We recognize that one of the indicia of pretext is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Manning*, 765 So.2d at 519 (¶ 9). However, the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext. *Hughes*, 90 So.3d at 626 (¶ 37) ("Where multiple reasons lead to a peremptory strike, the fact that other jurors may have some of the individual characteristics

of the challenged juror does not demonstrate that the reasons assigned are pretextual.").

¶ 119. The second reason the State gave for striking Wright was that she had been sued by Tardy Furniture. As a rebuttal to that reason, Flowers alleged at the *Batson* hearing that the State did not question white jurors about their accounts at Tardy Furniture. However, the court had asked all jurors during group voir dire if they had accounts at Tardy Furniture and if they had been sued by the store. The court found that the basis was race neutral because none of the white jurors had been sued by Tardy Furniture. On appeal, Flowers claims that the State mischaracterized Wright's litigation with Tardy Furniture by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. However, that does not change the fact that being sued by Tardy Furniture was a race neutral reason for striking Wright. Prior litigation is a race neutral reason for a preemptive strike. *See Webster v. State*, 754 So.2d 1232, 1236 (¶¶ 9–11) (Miss. 2000) (finding that potential juror's company being sued by defense attorney in previous and unrelated litigation was sufficient race neutral reason for peremptory strike).

¶ 120. The State's third reason for striking Wright was that she worked with Archie Flowers Sr. at Walmart. At the *Batson* hearing, Flowers rebutted that reason by comparing Wright's working relationship with Archie to Chesteen, a teller at a local bank where members of the Flowers family were customers. The

trial court found this to be a race neutral reason and found that Wright's working relationship with Archie was distinguishable from the professional relationship Chesteen had with the Flowers family. Chesteen worked at a local bank in Winona and stated that she knew Archie Flowers Sr., Lola Flowers, and Flowers's sisters from her work at the bank. We agree with the trial judge that a coworker relationship and bank employee/customer relationship are distinguishable. Further, the trial court stated that the Winona Walmart was the "smallest Wal-Mart . . . in existence" that he knew of, implying that Wright and Archie certainly had known each other. The trial court also stated that no white jurors had reported working at Walmart with Archie. Being acquainted with the defendant's family is a race neutral reason for striking a juror. *Manning v. State*, 735 So.2d 323, 340 (¶ 32) (Miss. 1999) ("We have condoned a peremptory challenge against a juror who was acquainted with the defendant's family.") (citing *Porter v. State*, 616 So.2d 899, 907 (Miss. 1993)).

¶ 121. Flowers's claim that the State provided "no convincing reasons" for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture. We also note that, on her juror questionnaire, Wright wrote that she previously had served as a juror in a criminal case involving the "Tardy Furniture trial." The State had multiple, credible, race neutral reasons for striking Wright, and the trial judge did not err in denying Flowers's *Batson* challenge as to the juror.

**2. Dianne Copper**

¶ 122. The State cited the following reasons for its exercise of a peremptory strike of Dianne Copper: (1) she had worked with Flowers's father and sister; (2) she knew several members of the Flowers family; (3) she said she "leaned toward" Flowers's side of the case due to her relationships with the Flowers family; and (4) she knew several defense witnesses. Flowers offered rebuttal to the State's reasons by again asserting that the State had not challenged white jurors connected to people involved in the case. He also claimed that the State did not attempt to rehabilitate Copper after she said leaned toward Flowers. The trial court found the State's reasons to be race neutral, concluding that Copper's relationships were distinguishable from those of the white jurors who were not challenged and recognizing that other jurors had not said they favored Flowers as Copper did.

¶ 123. During voir dire, Copper was questioned about her relationships with members of the Flowers family, and she revealed the following: Copper once lived in the same neighborhood as the Flowers family. She had worked with Flowers's sister, Cora, at Shoe World for "a year or two." She also had worked with Flowers's father for "one or two years." Copper testified that she knew Flowers's mother, Lola, and his brother, Archie Jr. She also knew more than twenty other potential witnesses. Altogether, Copper knew at least thirty people involved in the case. The State asked Copper about her comment that knowing so many

people connected to the case would make her lean toward Flowers:

> Q. And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connection to all of these people. Is that correct?
>
> A. It—it's possible.
>
> Q. Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?
>
> A. Yes, sir.
>
> Q. And it would make it to where you couldn't come in here and, just with an open mind, decide the case, would it?
>
> A. Correct.

At that point, Flowers's counsel attempted to rehabilitate Copper:

> Q. . . . What I'm trying to find out is just as you could put aside all the information you heard before about this case, could you not also put aside the fact—if you got picked as a juror, put aside the fact that you have met Mr. Flowers, that you know some other people in these cases and be fair to the Tardys, the Stewarts, the Goldens, and Rigbys, and make whatever decision or vote that you're going to make

based on the evidence and the evidence only. Could you do that?

A. I feel like I could. But, you know, it—

Q. Is what you're saying—

A. Of course, it would make me, you know, feel uncomfortable. But if I had to do it, you know, I got to do what I got to do.

Q. Okay. So you're saying that—thank you. You're saying that you'll be uncomfortable. You'd prefer not to—I get the impression you're saying that you'd rather not be a juror. But if you got picked to be one, you would take the responsibility seriously, and you would follow the law and the rules that the Court give[s] you, and you would put aside anything that you are required to put aside and make your evidence and make your vote based on just the evidence you hear in the courtroom. Is that fair to say?

A. Yes, sir. That's correct.

Clearly, Copper knew several members of the Flowers family and she was uncomfortable serving on the jury. That reason alone is a sufficient race neutral reason to strike her. *Manning*, 735 So.2d at 340 (¶ 32). Further, we have recognized "living near the defendant" as a race neutral reason for a peremptory strike. *Lockett v. State*, 517 So.2d 1346, 1356 (Miss. 1987) (citing *Taitano v. State*, 4 Va.App. 342, 358 S.E.2d 590 (1987)).

¶ 124. On appeal, Flowers claims that the State mischaracterized Copper's statement that she "leaned toward" Flowers due to her relationship with the Flowers family, but a reading of the record shows that the State correctly described her voir dire testimony. The State made the following argument during the *Batson* hearing:

> And the reason I point that out, it's not just that she knows those witnesses, but that because of knowing the family and working with those two family members, she stated that that relationship would influence her. She later said that—well, she could have an open mind. And then she was equivocal back and forth. But because of all those relationships, she clearly stated, when I asked her, that they would influence her. She could not have an open mind, and she was leaning toward the Defendant's family.

The State's argument accurately reflected Copper's testimony, including the defense's attempt to rehabilitate her. Even more, defense counsel asked Copper if she would "rather not be a juror," and she agreed. The Court has recognized that reluctance to serve as a juror is a race neutral basis for a peremptory strike. *Hughes*, 90 So.3d at 626 (¶ 36) (citing *Lynch v. State*, 877 So.2d 1254, 1274 (¶ 59) (Miss. 2004)).

¶ 125. Flowers claims that the State's strike of Copper was pretextual because white jurors who knew several defense witnesses were not struck. As mentioned above, one indicium of pretext is "the presence

of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Manning*, 765 So.2d at 519 (¶ 9). However, like Wright, the number of acquaintances was not the sole reason given by the State for striking Copper, so the instant basis is not an automatic showing of pretext. *See Hughes*, 90 So.3d at 626 (¶ 37). Again, Flowers claims that the State did not provide any convincing reasons for striking Copper and, again, Flowers's claim is unfounded. Copper lived in the same neighborhood as the Flowers family, knew multiple members of the family, and had worked with Flowers's father and sister. She admitted that, in light of the relationships, she leaned toward Flowers in the case. Copper also said that she would rather not serve as a juror. All of the given reasons are race neutral reasons for a peremptory strike. The trial court did not err in denying Flowers's *Batson* challenge as to Copper.

### 3. Flancie Jones

¶ 126. The State gave several reasons for the peremptory strike of Flancie Jones: (1) she was related to Flowers; (2) she was late for jury selection twice; (3) she provided inconsistent statements on her view of the death penalty; and (4) she lied on her juror questionnaire in an attempt to get out of jury service. The trial court found that the State had provided sufficient race neutral reasons for the strike.

¶ 127. In response to the State's first basis—that Jones is related to Flowers—Flowers claims that the

State mischaracterized and exaggerated Jones's relationship with Flowers. The State described the relationship between the two as follows: "She is related to the defendant. She admitted that she was related—she was a cousin—or the defendant's sister, Angela Jones, is her niece. So she said she guessed she must be related to him. Well, I guess so. He would be her nephew." During voir dire, Jones said that Flowers was her "sister-in-law's sister's son." She also said that Flowers's sister was her niece. Jones's statements regarding her relationship to Flowers were confusing, but the trial court seemed to understand and concluded that Jones had more than one familial connection to Flowers. The trial court stated:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's sister. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

Although one may not typically describe the child of an in-law's sibling as a niece or nephew, Jones's own statement that Flowers's sister was her niece supported the State's position that Flowers was Jones's nephew. Flowers's contention that the State mischaracterized and exaggerated the relationship is without merit. And, again, being acquainted with the defendant's family is a race neutral reason for striking a juror. *Manning*, 735 So.2d at 340 (¶ 32).

¶ 128. The other reasons the State provided for its strike also are race neutral. Jones was late for jury selection on two days. For one of the days, Jones's excuse was that she had difficulty waking up early in the morning because she used to work nights. On the other day, Jones said she was late because she was looking for her jury questionnaire. Jones also provided inconsistent statements on her view of the death penalty, and she admitted that she wrote on her questionnaire that she was against the death penalty in an effort to get out of jury service:

> Q: . . . And I think on your questionnaire, you said you were strongly against the death penalty.
>
> A: I guess I'd say anything to get off.
>
> Q: Okay. Well, are you saying that you didn't tell the truth?
>
> A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.
>
> Q: Well, I want to know when you put down you were strongly against the death penalty—
>
> A: I was trying to not be—I—really and truly, I don't want to be here. I'll say it like that.
>
> . . .

Q: When you put down that you strongly didn't believe in the death penalty, were you being truthful?

A: No. . . .

Being late on two days, lying on her questionnaire, and blatantly saying that she did not want to be there and that she would "say anything to get off" reflect an overall attitude of contempt toward jury service.

¶ 129. Jones's late arrival and her attitude toward jury service, evidencing a lack of concern about or commitment to the proceedings, are two race neutral reasons for a peremptory strike. *See Lynch*, 877 So.2d at 1274 (¶ 59) (reluctance to serve was a race neutral basis for a peremptory strike); *Brewer v. State*, 725 So.2d 106, 122 (Miss. 1998) (fact that the juror "had attempted to get off jury duty from the start" was a race neutral reason); *Lockett*, 517 So.2d at 1351–52 (striking of jurors based on attitude toward jury service is race neutral). In *Lockett v. State*, the Court provided a nonexhaustive list of race neutral reasons that had been recognized by other courts. The Court cited a Seventh Circuit case in which the court upheld the peremptory strike of a juror who arrived late and was inattentive, which indicated "a lack of commitment to the importance of the proceedings." *Lockett*, 517 So.2d at 1356 (citing *U.S. v. Mathews*, 803 F.2d 325, 331 (7th Cir. 1986)). *See also Hicks v. State*, 973 So.2d 211, 220 (¶ 28) (Miss. 2007) (inattentiveness is a race neutral reason). Unquestionably, Jones's attitude toward jury service was a proper race neutral reason for striking her.

¶ 130. The State did not misrepresent Jones's relationship with Flowers, and the State provided several race neutral reasons for striking her. Flowers's claims regarding Jones are without merit. The trial court did not err in denying Flowers's *Batson* challenge regarding the juror.

#### 4. Tashia Cunningham

¶ 131. The State's reasons for striking Tashia Cunningham included: (1) her working relationship with Flowers's sister, and (2) her wavering statements about the death penalty. At the *Batson* hearing, Flowers attempted to rebut by pointing to Cunningham's testimony that she could be a neutral juror and could set aside her relationship with Flowers's sister. Flowers compared Cunningham to Chesteen, who knew Flowers's family from the bank. Finally, Flowers claimed that Cunningham's alleged wavering views on the death penalty were similar to the views of white jurors. The trial court held that the State's reasons were race neutral, concluding: "Ms. Cunningham's all-over-the-map response to the death penalty, plus her situation about working so closely with Mr. Flowers's sister, in my mind, the State has shown race-neutral reasons for that strike."

¶ 132. During voir dire, Cunningham said she did not have a close relationship with Flowers's sister, Sherita Baskin. She said they had a "working relationship." Cunningham said she and Baskin had worked the same shift for two or three years, but they did not

see each other every day at work. Cunningham said she worked at the end of the assembly line, and Baskin worked at the front of the line. The State asked Cunningham further questions about that relationship:

Q: And you work with the Defendant's sister, Sherita Baskin?

A: Yes.

Q: Now, the other day, I think you said that you do not work close to her?

A: No, I do not.

Q: Would you think about that for a minute?

A: I do not.

Q: Are you sure that you do not work side by side with her?

A: No, I do not.

Q: And you're saying that under oath?

A: Yes, sir.

The State then called Cunningham's employer, ADP, to confirm her testimony relating to her working relationship with Baskin. An ADP quality control clerk, Crystal Carpenter, testified that Cunningham and Baskin worked on the same assembly line with twenty-five to thirty-five people. Carpenter testified that Cunningham and Baskin worked side-by-side, "nine or ten inches" apart from one another. Carpenter testified that she saw the women working every day and that her testimony was based on her personal

observations. Flowers's counsel asked Carpenter if there was documentation supporting the location of Cunningham and Baskin on the assembly line, and Carpenter said she could provide documentation supporting her testimony. Apparently, Carpenter did not provide the documentation. Thus, Flowers claims that the instant basis for the State's peremptory strike is unfounded. Flowers's claim is without merit.

¶ 133. We hold that the blatantly conflicting testimony of Cunningham and Carpenter was a race neutral basis for th. State's challenge, as concern about a juror's honesty constitutes a race neutral reason. *See Collins v. State*, 691 So.2d 918, 927 (Miss. 1997) (a juror will be disqualified for withholding substantial information or misrepresenting material facts); *Mack*, 650 So.2d at 1300 (State's challenge upheld where the juror failed to reveal that her husband had pending charges against him); *Foster*, 639 So.2d at 1280 (as to one juror, the State said "his demeanor was such that I did not feel that he was being perfectly honest with us" and the Court held that the State had provided race neutral reasons). *See also Aguilar v. State*, 847 So.2d 871, 877 (¶ 14) (Miss. Ct. App. 2002) (concern that juror was being dishonest was a valid reason).

¶ 134. The State cited Cunningham's wavering views on the death penalty as a second basis for its peremptory strike. On her juror questionnaire, Cunningham marked that she had "no opinion" on the death penalty but, on the very next question, she marked that she would not consider the death penalty under any circumstances. During voir dire by the trial

court, Cunningham first said she "would not" consider the death penalty and that she "did not believe in the death penalty." She confirmed for the court three times that she would not consider the death penalty. However, as questioning continued, Cunningham wavered, saying she "might" be able to consider it. During voir dire by the State, Cunningham went back to her initial position that she did not think she could consider the death penalty. Then, when questioned by defense counsel, Cunningham said that she could consider both life in prison and the death penalty. We have held that "having doubts as to one's ability to follow the law and vote for the death penalty when appropriate is a sufficient race-neutral reason." *Manning*, 735 So.2d at 340 (¶ 31) (citing *Johnson v. State*, 529 So.2d 577, 584–85 (Miss. 1988)). Further, providing inconsistent statements is a race neutral basis for striking a juror. *Hicks*, 973 So.2d at 220 (¶ 27); *Lynch*, 877 So.2d at 1272 (¶ 51) (verbal responses and juror's card were inconsistent).

¶ 135. During the *Batson* hearing, Flowers's counsel attempted to compare Cunningham to Jeffery Whitfield, a white juror who had "mixed feelings about the death penalty." Unlike Cunningham, Whitfield never said that he would be unable to impose the death penalty. We have recognized that a juror's views on the death penalty may provide a race neutral basis for a peremptory challenge. *See Batiste*, 121 So.3d at 848; *Pitchford*, 45 So.3d at 229 (¶ 40); *Flowers III*, 947 So.2d at 920–21. In *Flowers III*, the Court held that striking an African American who had "virtually indistinguishable" views on the death penalty as white jurors who

were not struck raised an inference of discrimination, although, standing alone, it did not warrant finding a *Batson* violation. *Flowers III*, 947 So.2d at 921. In the instant case, no white jurors survived for-cause challenges who had views on the death penalty comparable to Cunningham's views. Thus, this basis was not pretextual. Cunningham's seeming dishonesty about her relationship with Baskin, her doubt about whether she could impose the death penalty, and her inconsistent statements about the death penalty are all race neutral reasons for a peremptory strike. The trial court did not err in denying the *Batson* challenge as to Cunningham.

### 5. Edith Burnside

¶ 136. The State gave the following reasons for striking Edith Burnside: (1) she knew Flowers and members of his family; (2) she was sued by Tardy Furniture; and (3) she had provided inconsistent statements regarding her views on the death penalty. As discussed above, during group voir dire, the trial court asked the entire venire if anyone had been sued by Tardy Furniture. Thus, again, Flowers's claim that only African-American venire members were asked about prior litigation is incorrect. Burnside responded in the affirmative, telling the court that she had been sued by Tardy Furniture. She later explained that she had paid the amount she owed and that the litigation had arisen from a misunderstanding about her account after the murders.

¶ 137. At the *Batson* hearing, the State incorrectly stated that a garnishment had been issued against Burnside. The prosecutor said: "She also was sued by Tardy Furniture, and a garnishment was issued against her. She tried to deny that and said that she just settled with them when she came back but she was, in fact, sued by them." In response to the trial court's question about being sued by the store, Burnside had said: "I had an account there, but I was not sued by Ms. Bertha. It was later on when it was took over by Mr. Frank and Roxanne." During individual voir dire, Burnside confirmed that she was sued by Bertha Tardy's son-in-law, but that she had paid him and they "never had a falling out about it." She said the lawsuit would not cause her any difficulty in Flowers's case. Like the State's characterization of Wright's litigation with Tardy Furniture, the statement that Burnside's wages had been garnished and that Burnside had denied it was not supported by the record. However, prior litigation is a race neutral basis for a peremptory strike. *Webster*, 754 So.2d at 1236 (¶¶ 9–11).

¶ 138. Another reason the State gave for striking Burnside was her relationships with Flowers and his family. Burnside said that she had once lived near the Flowers family, and Flowers and his sister used to visit her home. Flowers was a friend of Burnside's sons and played football with them. Burnside said that the relationships would not affect her ability to serve as a juror. No white venire members had relationships remotely comparable to the relationships Burnside had

with Flowers and his family. A juror's relationships with the defendant's family is a race neutral reason for a peremptory challenge. *Manning*, 735 So.2d at 340 (¶ 32). And, again, "living near the defendant" is a race neutral reason for a peremptory strike. *Lockett*, 517 So.2d at 1356. If simply living near the defendant is a valid reason, then certainly the defendant having visited the juror's home and having been a friend to her children is a valid, race neutral reason. Although Burnside said her connections to the Flowers family would not affect her jury service, the basis is not pretextual.

¶ 139. Finally, the State cited Burnside's statements regarding whether she could judge another person and whether she could impose the death penalty as bases for its peremptory strike. During voir dire, Burnside testified as follows:

> Q: . . . And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A: That I don't think I could do. I don't know if I could do that. . . . I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.
>
> Q: And can you explain further your views on that?
>
> A: I've just never been put in that predicament. I've always just don't know if I could do that. It's just the best way I can

explain it. I just don't think I could do that.

Q: Again, let me explain. You're not committing to do it or not to do it. You're just—we just need to know if that's something that would be in your mind where you could think about it and you could consider the possibility of it.

A: I could think about it and consider it. That's all I could say.

Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?

A: If I was on there, yeah, I guess I'd have to.

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Q: Also, if he did not receive that death sentence—if he was convicted and the jury did not impose the death sentence, . . . [he] would receive the sentence of life without parole. So is that a sentencing option that you could consider, also?

A: Yes, I could consider that.

Q: And so you would consider and have an open mind as to both sentencing options then; is that correct?

A: Yes, sir.

Burnside eventually said she could consider both sentencing options, but later she said again that her reservations about judging another person would affect her ability to serve as a juror:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But then when they come back and say could I be fair. My thing is I prefer not to judge anyone. But no, I will be fair.

Q: All right. Who will you be fair to?

A: I will be fair to whoever evidence is presented. I will be fair. Because I would want somebody to be fair to me or my children or my family. That the only way I can explain it.

. . .

Q: So you have changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in the case; is that right?

A: It could, possibly, yes, sir.

Flowers's counsel attempted to rehabilitate Burnside:

Q: Ms. Burnside, if you got picked on the jury, you would be fair to both sides, wouldn't you?

A: Yes, sir.

Q: And despite the fact that you don't like to judge, if you got picked you would, in fact, judge and be fair to both sides; is that correct?

A: Yes, sir, that is correct.

¶ 140. A juror's views on the death penalty and hesitation about serving as a juror are race neutral reasons for peremptory challenges. *See Batiste*, 121 So.3d at 848; *Hughes*, 90 So.3d at 626; *Flowers III*, 947 So.2d at 920–21. Further, there were no white jurors in the venire whose views and hesitation regarding judgment were comparable to Burnside's views. Although Flowers's counsel did rehabilitate Burnside, her remarks unquestionably were a race neutral basis for the challenge. The trial court did not err in denying the

*Batson* challenge as to Burnside, as the State provided multiple race neutral reasons for striking her.

### C. *Batson* Conclusion

¶ 141. We hold Flowers's claim that the trial court erred in denying his *Batson* challenges to be without merit. While the State did ask more questions of potential African-American jurors than white jurors, disparate questioning alone is not dispositive of purposeful discrimination. *Hughes*, 90 So.3d at 626 (¶ 37); *Manning*, 765 So.2d at 520 (¶ 15); *Berry*, 802 So.2d at 1039 (¶ 20). Further, the State's contention that the additional questions were asked to clarify and follow up on certain issues is supported by the record. The State provided multiple race neutral reasons for the peremptory strikes against each of the five African Americans. The evidence indicates that the race neutral reasons were valid and not merely pretextual.

¶ 142. The "exceptional circumstances" present in *Foster* and *Miller-El II*, which prevented the appellate courts' deference from being given to the trial court's factual determinations, are not present in the case *sub judice*. In *Foster* and *Miller-El II*, the record demonstrated a policy to exclude prospective African-American jurors, which completely undermined the race neutral explanations urged by the prosecution for exercising their strikes. *See Foster*, 136 S.Ct. 1737; *Miller-El II*, 545 U.S. 231, 125 S.Ct. 2317. Similar evidence undermining the prosecution's explanations simply is not present in the case *sub judice*. Taking into

account the "historical evidence" of past discrimination, *i.e.*, Evans's past *Batson* violations, the Court remains unpersuaded that the trial court erred in finding that the State did not violate *Batson*. Accordingly, the trial court did not err in denying Flowers's *Batson* challenges.

## VII. Whether the venire was biased, resulting in an unfair trial, such that reversal and remand for a new trial is warranted.

¶ 143. Flowers raises two subissues related to alleged bias in the venire and empaneled jury: (1) whether the jury did not adequately deliberate because it was influenced by racial bias in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (2) whether the pervasive bias in the venire infected the fairness of the proceedings, requiring reversal and remand for a new trial. Flowers implies that African-American jurors either were afraid to serve as jurors or were afraid to find Flowers not guilty as a result of the alleged pervasive racial bias in Montgomery County.

### A. Adequate Deliberations

¶ 144. The jury deliberated for twenty-nine minutes during the guilt-or-innocence phase and for an hour and a half during the sentencing phase. Our cases support that the time spent deliberating was adequate. In a capital murder case, we have held that a ten-minute guilt-or-innocence deliberation and a one-hour

sentencing deliberation were adequate. *Gray*, 728 So.2d at 62–63. The well-settled rule is that "there is no formula to determine how long a jury should deliberate." *Id.* at 62 (¶ 125) (quoting *Smith v. State*, 569 So.2d 1203, 1205 (Miss. 1990)). In *Smith v. State*, we explained:

> Because the jury's time of considering their verdict did not exceed seven minutes, it does not follow that the jurors did not carefully consider the testimony and the exhibits. It is not only possible but probable that when the state and the defendant had rested and the summations had been made each juror had decided in his mind the issue of innocence or guilt. After the brief deliberation with each other, the jurors found that they were of a single mind as to the guilt or innocence of the appellant and found him to be guilty.
>
> Under the facts of this case this Court is unwilling to lend its authority to the establishment of any formula or guideline relating to the time a jury must deliberate before delivering its verdict. This Court is cognizant of the fact that in the past in occasional cases, as in the case at bar, rather brief deliberations have taken place in the jury room and verdicts have been returned with unusual rapidity. There is no yardstick of time which a jury should use before reaching a verdict. No two cases are similar as to facts and therefore the law varies in its application thereto. Therefore, we cannot hold that in the time utilized by the jury it could not reach a proper verdict of guilty.

*Smith*, 569 So.2d at 1205 (quoting *Johnson v. State*, 252 So.2d 221, 224 (Miss. 1971)). Based on length of the deliberations alone, Flowers's argument that the jury's deliberation was inadequate has no merit. However, Flowers's argument is not based solely on the length of time. He contends that the short amount of time spent deliberating is indicative of racial bias in the jury and venire.

### B. Biased Venire

¶ 145. Flowers claims that he was denied the right to a fair trial because the jury was biased. "The right to a fair trial by an impartial jury is fundamental and essential to our form of government. It is a right guaranteed by both the federal and state constitutions." *Johnson v. State*, 476 So.2d 1195, 1209 (Miss. 1985). The United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" U.S. Const. amend. VI. Likewise, the Mississippi Constitution provides: "In all criminal prosecutions the accused shall have a right to . . . a speedy and public trial by an impartial jury of the county where the offense was committed." Miss. Const. art. 3, § 26. We have recognized that the right to a trial by an impartial jury and the right to a trial in the location where the offense occurred can be at odds with one another. *See Johnson*, 476 So.2d at 1210.

¶ 146. Flowers takes several approaches to support his contention that he was denied the right to a fair trial because the jury was biased. He asserts that: (1) racial bias in the community is evident by the Court's opinion in *Flowers III*; (2) racial bias and tension was demonstrated by the arrest of two African Americans for perjury during one of Flowers's previous trials; (3) excessive law enforcement personnel were present at the trial; (4) a majority of the jurors empaneled were acquainted with either Flowers or the victims or had formed opinions related to the case prior to trial; (5) the trial court erroneously denied several of Flowers's challenges for cause; (6) the trial court erred by failing to quash the entire venire; and (7) the jury interrupted an important mitigation witness. To cure the alleged biases, Flowers claims that the trial court should have quashed the venire or, in the alternative, provided for a "cooling-off period" until an unbiased jury from Montgomery County could be empaneled.

¶ 147. First, Flowers asserts that bias is evident from the Court's holding in *Flowers III*. Flowers's claim comes from the Court's statement in *Flowers III* that the case presented "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935 (¶ 66). The problems surrounding jury selection in *Flowers III* are not present in today's case. In that case, the State exercised all twelve of its peremptory strikes on African Americans and its three peremptory strikes for alternate jurors on African Americans. *Id.*

at 917–18. The Court found that the following facts resulted in a *Batson* violation: the State exercised peremptory strikes against African-American veniremen who shared characteristics with tendered white jurors; the State's proffered race neutral reasons for striking African Americans were not supported by the record; and the State failed to voir dire other jurors as to a characteristic cited as a race neutral basis. *Id.* at 935–39. However, the facts were particular to the third trial, and *Flowers III* does not stand for the proposition that the community as a whole—and any future venire—would be biased. The claim is without merit.

¶ 148. Second, Flowers claims that racial tension was escalated by the arrests of two African-American jurors for perjury during Flowers's fourth trial. During that trial, Mary Annette Purnell, an African American who was selected to serve as alternate juror, said during voir dire that she did not know Flowers or his family, but after the jury was selected, another juror reported to the prosecution that Purnell knew Flowers and his family. Purnell admitted to meeting with Flowers prior to the trial but after the jury summons. Apparently, during jury selection, Flowers gave his attorney a note that said they needed to "fight for" Purnell to be on the jury. Flowers's counsel denied having read the note prior to the perjury accusations. Purnell pleaded guilty to perjury and received two ten-year sentences.

¶ 149. At the end of the fourth trial, after the jury was unable to reach a unanimous decision, jurors reported to the trial court that James Bibbs, an

African-American juror, had told other jurors that the police did not adequately investigate the murders and that evidence had been planted. After the jury was released, the trial court questioned Bibbs about the reports. Bibbs denied making the exact statements, but he admitted that he had told other jurors that he had been in an alley close to Tardy Furniture on the day of the murders and that investigators did not inspect that area. Bibbs claimed that he did not report the information during voir dire because he misunderstood questions relating to whether he had knowledge of the crimes. Although the reason is unclear from the record, the perjury charges against Bibbs eventually were *nolle prossed*.

¶ 150. Flowers claims that Bibbs was possibly the only juror at the fourth trial who did not vote to convict Flowers. He further contends that the perjury arrests "escalated" racial tension and that the arrests were reported in the press and "pervaded the jury venire" in today's case. To support his contentions, Flowers cites local media articles discussing the perjury arrests. Nothing in the record, however, discusses whether members of the venire in today's case were aware of the arrests. Further, nothing in the record suggests that the arrests were anything less than legitimate. Clearly, Purnell admitted to perjury, and Bibbs admitted to having knowledge that he did not disclose during voir dire. The contention is not supported by the record and is without merit.

¶ 151. Next, Flowers's claim that excessive law enforcement presence caused bias in the venire also is

without merit. When Flowers's counsel raised concerns that venire members were standing close to a law enforcement officer during voir dire, the trial court responded by reminding counsel that the potential jurors could be questioned about any contact with law enforcement during voir dire. Considering the notoriety of the crimes in the case, a large number of law enforcement personnel would be expected.

¶ 152. Further, Flowers's claim that the jury interrupted a mitigation witness is not supported by the record. During the mitigation phase, pizza was ordered for the jury. Apparently, the pizza arrived while Archie Flowers Sr., Flowers's father, was providing mitigation testimony. In response to the food arriving, Flowers's counsel stated: "Your honor, if the jurors' food is here, I don't want to stand in the way of that." There is no indication that the jury interrupted the witness, and Flowers's counsel encouraged the recess.

¶ 153. Flowers asserts that a majority of the jurors empaneled were acquainted with Flowers, acquainted with the victims, or had formed opinions related to the case prior to trial. Flowers claims that the venire was skewed in favor of the prosecution because a higher percentage of potential jurors who were familiar with Flowers and his family were struck from the venire compared to venire members who were familiar with the victims and their families. He claims that, because potential jurors who were familiar with the Flowers family were more likely to state that their relationships with the family would affect their ability to serve as fair and impartial jurors, ultimately, a

higher percentage of jurors who were familiar with the victims and their families was empaneled.

¶ 154. Jurors who state that their relationship with a defendant or a victim would affect their ability to be impartial properly are struck for cause. *See Manning*, 735 So.2d at 340 (¶ 31) ("doubts as to one's ability to follow the law and vote for the death penalty when appropriate is a sufficient race-neutral reason"); *Stevens*, 806 So.2d at 1062 (¶ 138) (removal of juror is justified where the trial court is [sic] "is left with the impression that a prospective juror would be unable to faithfully and impartially apply the law") (quoting *Wainwright v. Witt*, 469 U.S. 416, 426, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); *Davis v. State*, 660 So.2d 1228, 1244 (Miss. 1995) (same). However, when jurors indicate that they can be impartial, they do not have to be struck based on relationships alone. "The linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen." *Hughes v. State*, 983 So.2d 270, 284 (¶ 63) (Miss. 2008) (quoting *Howell*, 860 So.2d at 720 (¶ 37)). Thus, if jurors indicated that they could not be fair and impartial, they properly were struck. The claim is without merit.

¶ 155. Flowers's claim that the trial court erred by denying several of his challenges for cause fails. The potential jurors that Flowers challenged for cause were not selected to serve as jurors, and Flowers did not exercise all of his peremptory challenges. "Denial of challenge for cause is not error where it is not shown that the defense has exhausted peremptory challenges and is thus forced to accept the juror. This threshold

test is applicable in a capital murder case." *Berry v. State*, 575 So.2d 1, 9 (Miss. 1990) (citing *Billiot v. State*, 454 So.2d 445, 457 (Miss. 1984); *Rush v. State*, 278 So.2d 456, 458 (Miss. 1973)).

¶ 156. Lastly, Flowers suggests that the trial court should have quashed the entire venire or provided for a "cooling-off period" until a fair and impartial jury could be empaneled, and he claims that the trial court's failure to do so was error. Flowers's suggested remedies are not viable. Flowers's claim that a pervasive bias existed throughout the community conflicts with his suggestion that another venire should have been empaneled. If the bias was in fact pervasive, another venire from the same community likely would contain the same bias. Flowers's suggested "cooling-off period" is even more troublesome, as Flowers himself would be left in limbo awaiting another trial. In *Hughes v. State*, we held that the trial court did not err in denying the defendant's motion to quash the venire based on the crime being well known within the community. *Hughes*, 983 So.2d at 284 (¶ 64). Because the jurors indicated that their knowledge of the case would not affect their ability to be fair and impartial, the trial court did not abuse its discretion in denying the motion to quash. *Id.* Again, "[t]he linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen." *Id.* at 284 (¶ 63) (quoting *Howell*, 860 So.2d at 720 (¶ 37)).

¶ 157. A more appropriate remedy would be to expand the size of the venire. *See Toyota Motor Corp. v. McLaurin*, 642 So.2d 351, 358 (Miss. 1994); *Mhoon v.*

*State*, 464 So.2d 77, 82 (Miss. 1985), *superseded by statute on other grounds*. However, the size of the venire was appropriately large, as 600 people were called for voir dire. Thus, it would seem that the trial court called a large enough venire to avoid problems. Trial courts have broad discretion in conducting voir dire. *See Howell*, 860 So.2d at 726 (¶ 67). "A jury selection procedure which gives the defendant 'a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror' is proper." *Id.* at 726–27 (¶ 69) (quoting *McLemore v. State*, 669 So.2d 19, 25 (Miss. 1996)). We cannot say that the trial court abused its discretion in conducting voir dire. For the foregoing reasons, Flowers's claims that he was denied the right to a fair trial because the jury was biased are without merit.

**VIII. Whether the trial court erred in refusing Flowers's requested culpability-phase instructions.**

¶ 158. Flowers claims that the trial court erred in refusing three of his culpability-phase instructions—D–7, D–8, and D–9. "Jury instructions are within the sound discretion of the trial court." *Gillett*, 56 So.3d at 496 (¶ 67) (quoting *Rubenstein*, 941 So.2d at 787 (¶ 239)).

> This Court does not single out any instruction or take instructions out of context; rather, the instructions are to be read together as a whole. *Thomas v. State*, 818 So.2d 335, 349

> (Miss. 2002). A defendant is entitled to have jury instructions which present his theory of the case. *Id.* This entitlement is limited, however, in that the court is allowed to refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Id.*

*Gillett*, 56 So.3d at 496 (¶ 67) (quoting *Walker v. State*, 913 So.2d 198, 234 (¶ 132) (Miss. 2005)).

¶ 159. Flowers claims that the trial court erred in refusing instruction D–6 because he was entitled to an instruction on the burden of proof. That instruction read as follows:

> Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

The trial court refused the instruction, finding that it was repetitive of instruction S-1, which stated that the State must prove all of the elements of the crimes beyond a reasonable doubt. Because the instructions are repetitive, the trial court did not err in denying D–6. *See Montana v. State*, 822 So.2d 954, 961 (¶ 26) (Miss. 2002) ("A trial judge is under no obligation to grant redundant instructions."). The issue is without merit.

¶ 160. Instructions D–7 and D–8 were circumstantial-evidence instructions. They provided:

> D–7: The Court instructs the jury that [if] the prosecution has used circumstantial evidence to show that Curtis Flowers committed the charged crimes, then the evidence must be so strong as to rule out any other reasonable explanation except that of guilt. Circumstantial evidence is anything other than direct evidence, such as, to give one example, testimony of someone who witnessed an event. In other words, you may not return a verdict of guilty if you could reasonably interpret the facts in a way that would show Mr. Flowers to be not guilty.
>
> D–8: The Court instructs the jury that if there is any fact or circumstance in this case susceptible of two interpretations, one favorable and the other unfavorable to Curtis Flowers, and when the jury has considered such fact or circumstance with all the other evidence, if there is a doubt as to the correct interpretation, then you must resolve such doubt in favor of Curtis Flowers and interpret that fact or circumstance in favor of Mr. Flowers.

In support of his argument that the trial court erred in refusing the instructions, Flowers attacks the credibility of Odell Hallmon, the jailhouse informant. Flowers recognizes that Mississippi caselaw allows trial courts to refuse circumstantial-evidence instructions in cases in which direct evidence of the crime is

presented, which includes testimony from a jailhouse informant. *See Ladner*, 584 So.2d at 750 (case is not circumstantial even if the only direct evidence is a "jailhouse confession").

¶ 161. Flowers, however, relies on the Court's opinion in *McNeal v. State*, 551 So.2d 151 (Miss. 1989), for the proposition that jailhouse informant testimony should not serve as a basis for refusing a circumstantial-evidence instruction when the informant's credibility is questionable. In *McNeal*, the jailhouse informant testified in exchange for a reduced sentence. *Id.* at 158. The Court questioned the refusal of the instruction in *McNeal*, but the case was reversed and remanded on other grounds, so the Court did not go so far as to find that a circumstantial-evidence instruction should have been given. *Id.* at 158–59 ("It is doubtful that such testimony should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction; however, we do not decide that question here, nor is it necessary, because we find merit and reverse under [another] assignment of error.").

¶ 162. The Court has clarified the jailhouse informant/circumstantial evidence issue in subsequent cases. In *Ladner*, the Court held that it was not error to refuse such an instruction in the case of a jailhouse informant:

> A circumstantial evidence instruction must be given only when the prosecution can produce neither an eyewitness nor a confession/statement by the defendant. The "confession" which constitutes direct evidence of a crime is

> not limited to a confession to a law enforcement officer but also includes an admission made to a person other than a law enforcement officer. In *Holliday v. State*, 455 So.2d 750, 752–53 (Miss. 1984), a witness testified that he had overheard the defendant say to another person that he had killed his wife. This Court held that the circumstantial evidence instruction was not required. *See Foster v. State*, 508 So.2d 1111, 1115 (Miss. 1987) (Court held that without "jailhouse confession" the case would have been entirely circumstantial).

*Ladner*, 584 So.2d at 750 (other citations omitted). The Court then stated that, because *McNeal* was decided on other grounds, it did not support the defendant's proposition that a circumstantial-evidence instruction should have been given. *Id.* at 750 n.1. We reaffirmed the *Ladner* holding in *Moore v. State*:

> As [the defendant] points out, prior to *Ladner*, this Court expressed doubt as to whether a jailhouse informant's testimony "should be considered as direct evidence which would prevent the granting of a circumstantial evidence instruction." *McNeal*, 551 So.2d at 159. While *McNeal* declined to answer that question, *Ladner* settled the matter, holding that when the type of testimony given by [the informant] in the case sub judice is present, circumstantial evidence instructions are not necessary.

*Moore*, 787 So.2d at 1288 (¶ 18). Following the Court's holdings in *Ladner* and *Moore*, the trial court in today's

case found that Hallmon's testimony provided direct evidence of the crimes and denied instruction D–7 and D–8. We recognize that Hallmon's credibility is questionable. However, Hallmon was cross-examined extensively at trial, and the trial court instructed the jury "that the law looks with suspicion and distrust on the testimony of a jailhouse informant, and requires the jury to weigh the same with great care and suspicion." The jury was instructed adequately regarding Hallmon's testimony, and the trial court did not err by refusing the circumstantial-evidence instructions under *Moore* and *Ladner*. The issue is without merit.

## IX. Whether the trial court erred in refusing Flowers's penalty-phase instructions and in granting the State's aggravating-circumstances instruction.

¶ 163. Flowers claims the trial court erred in denying several of his penalty phase jury instructions—D–4, D–12, D–33, D–34, D–38, and D–39. He also asserts that the trial court erred by allowing the State's aggravating-circumstances instruction. Again, jury instructions are within the sound discretion of the trial court, and the trial court properly refuses instructions that are incorrect statements of the law, are covered fairly in other instructions, or do not have a foundation in the evidence. *Gillett*, 56 So.3d at 496 (¶ 67).

### A. Instruction D–4

¶ 164. Flowers contends that the trial court erred in refusing instruction D–4, which was a "presumption of life" instruction. The proffered instruction read:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in this case would be life imprisonment. These presumptions remain with Mr. Flowers throughout the sentencing hearing and can only be overcome if the prosecution convinces each one of you, beyond a reasonable doubt, that the death penalty is the only appropriate punishment.

The Court consistently has refused to find error when a trial court denies presumption-of-life instructions. *See Gillett*, 56 So.3d at 514 (¶ 135); *Brown v. State*, 890 So.2d 901, 920 (¶ 72) (Miss. 2004) ("We have repeatedly said that we reject the 'proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment.'") (quoting *Watts v. State*, 733 So.2d 214, 241 (¶ 81) (Miss. 1999)). As such, the trial court did not err in refusing the presumption-of-life instruction.

### B. Instructions D–12 and D–33

¶ 165. Flowers claims that the trial court erred by refusing to grant two instructions related to aggravating

circumstances and circumstantial evidence. The instructions provided:

> D–12: The Court instructs the jury that if the State has relied on circumstantial evidence to establish an aggravating circumstance, then the evidence for the State must be so strong as to establish the aggravating circumstance not only beyond a reasonable doubt, but must exclude every other reasonable hypothesis other than establishment of the aggravating circumstance.
>
> D–33: During the penalty phase, I instruct you that if there is a fact or circumstance in this case which is susceptible of two interpretations, one favorable and the other unfavorable to Mr. Flowers and if, after considering all the other facts and circumstances, there is a reasonable doubt regarding the correct interpretation, then you must resolve such doubt in favor of Mr. Flowers and place upon such fact or circumstance the interpretation most favorable to Mr. Flowers.

Flowers claims that whether a criminal defendant is entitled to a circumstantial-evidence instruction during the penalty phase is a matter of first impression. Flowers is incorrect. We have held that a trial court did not abuse its discretion in refusing to grant circumstantial-evidence instructions at the penalty phase. *Fulgham*, 46 So.3d at 340 (¶ 80); *King v. State*, 960 So.2d 413, 446–47 (¶ 70) (Miss. 2007). In support of its finding, the *King* Court wrote that the jury's finding that the defendant actually committed the murder

during the guilt-or-innocence phase "indicate[d] its rejection of any other reasonable hypothesis of [the defendant's] participation in the crime." *King*, 960 So.2d at 446 (¶ 70). Instructions D–12 and D–33 are almost identical to the instruction at issue in *Fulgham*. The trial court did not err in refusing the instructions.

### C. Instruction D–34

¶ 166. Instruction D–34 provided: "The Court instructs the jury that if you cannot, within a reasonable time, agree as to punishment, the court will dismiss you and impose a sentence of imprisonment for life without the benefit of parole." Flowers claims that the trial court should have granted the instruction because the jury did not receive guidance on what would happen if the jurors could not agree unanimously on a punishment. Flowers contends that the alleged error is evident by a note sent from the jury during the penalty phase. The note stated: "If we cannot agree unanimously, who will make the ultimate decision?" The trial court responded to the note by stating: "That is not an issue the jury should be concerned about."

¶ 167. The Court has reviewed almost identical instructions in previous cases and found that the trial court did not err in refusing the proffered instructions. In *Gillett*, we held that the trial court did not err in refusing an instruction that stated: "If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of life without the benefit of parole. If you cannot agree, know that

any of you may inform the bailiff of this." *Gillett*, 56 So.3d at 515 (¶ 138). Because the jury was instructed on the three possible penalty phase outcomes—death, life imprisonment without parole, or inability to agree unanimously on a punishment—the Court held that the jury was properly instructed on the possibility of not reaching a unanimous decision. *Id.* at 516 (¶ 139). In another capital murder case, the Court held that the trial court did not err in refusing the following instruction: "The court instructs the jury that if you do not agree upon punishment the court will sentence the defendant to life imprisonment without possibility of parole or early release." *Edwards v. State*, 737 So.2d 275, 316 (¶ 142) (Miss. 1999). The *Edwards* Court held that the jury was adequately instructed that it could "return to the courtroom and report that it was unable to agree unanimously on punishment." *Id.* at 316 (¶ 143).

¶ 168. Similar to *Gillett* and *Edwards*, the trial court in today's case instructed the jury that it could reach three possible outcomes in the penalty phase: death, life without parole, or being unable to agree unanimously on a punishment. Accordingly, the trial court did not err in refusing instruction D–34.

### D. Instructions D–38 and D–39

¶ 169. Flowers claims that the trial court erred by refusing instructions on the jury's ability to consider mercy. Proposed instruction D–38 read:

> A mitigating factor is anything that in fairness and mercy may reduce blame or that may

> justify a sentence less than death. Even if a factor does not justify or excuse the crime it may still be a mitigating factor. It is for each of you to decide if a factor is mitigating.
>
> Mercy alone can be a mitigating factor you can consider in deciding not to impose the death penalty and to impose a sentence of life without parole.

Instruction D–38 is clearly a mercy instruction, and the Court has recognized that such instructions are not required and "may be given at the discretion of the trial court." *Foster*, 639 So.2d at 1300. Flowers's counsel recognized during the sentencing instruction hearing that D–38 was a mercy instruction. The trial court did not err in refusing the instruction.

¶ 170. Instruction D–39 provided: "The death penalty is never required. You may always find that Mr. Flowers should be sentenced to life in prison or life in prison without the possibility of parole." Although Flowers describes D–39 as a "mercy instruction," upon close examination, the instruction simply seems to instruct the jury on its ability to impose a sentence of life in prison rather than the death penalty. At the sentencing instruction hearing, the trial court refused the instruction because it was repetitive of the omnibus sentencing instruction given by the trial court. As part of the omnibus instruction, the jury was instructed: "In the event that you find that the mitigating circumstance(s) do not outweigh or overcome the aggravating circumstance(s), you *may* impose the death sentence." (Emphasis added.) Thus, the jury was given the option

to sentence Flowers to life without parole or to impose the death penalty if it found that the aggravating circumstances outweighed the mitigating circumstances. Although the life without parole option was stated more clearly in D–39 than in the omnibus instruction, it cannot be said that the jury was not given the instruction. The trial court did not err in refusing instruction D–39.

### E. Aggravating Circumstances

¶ 171. The court instructed the jury on three aggravating circumstances: (1) "the Defendant knowingly created a great risk of death to many persons"; (2) "the capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain"; and (3) "the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." *See* Miss. Code Ann. § 99–19–101(5) (Rev. 2015). Flowers claims that the trial court erred in issuing the instruction.

#### 1. Great Risk of Death to Many Persons

¶ 172. Flowers asserts that the trial court erred by allowing the jury to consider the aggravating factor of "great risk of death to many persons." The Court has held that the "great risk" aggravator is appropriate when there are multiple victims of a single crime. *See Flowers II*, 842 So.2d at 560 (¶ 91) (quoting *Flowers I*,

773 So.2d at 325 (¶ 53) (citing *McGilberry v. State*, 741 So.2d 894, 925 (¶¶ 130–36) (Miss. 1999))). *See also Jackson v. State*, 672 So.2d 468, 490 (Miss. 1996) (when "multiple victims have been stabbed in the same or a nearby room, courts in other jurisdictions generally have found that there was sufficient evidence to warrant the 'great risk to many persons' aggravating circumstance") (collecting cases). Flowers acknowledges the Court's prior holdings, but he asks the Court to rule differently here.

¶ 173. To give the instruction, the defendant must have created a great risk of death to someone other than his intended victim. *Porter v. State*, 732 So.2d 899, 906 (¶ 31) (Miss. 1999). In *Porter*, the Court held that the evidence did not support the "great risk" aggravator because the defendant had killed only one person, whom he had been hired to kill, and he fled the scene after shooting that person, even though other people were inside the house at the time. *Id.* In *Corrothers v. State*, the Court held that the "great risk" aggravator was proper because the "evidence showed that Corrothers entered the home intending to attack Taylor, and in doing so, he shot Frank and Tonya and held a gun on Josh." *Corrothers*, 148 So.3d at 320 (¶ 118).

¶ 174. Flowers asserts that the evidence does not indicate that the person who killed the four victims had any intention to harm anyone other than the victims he was robbing. The State's theory was that Flowers intended to kill Bertha Tardy because she fired him and withheld his pay and, in the process of doing so, he

shot and killed the others. Flowers knew Carmen Rigby from working at the store, but there is no evidence that he knew Robert Johnson or Derrick Stewart, as the day of the murders was their first day to work at the store. Based on the State's theory of the case, which was presented to the jury, we hold that there was sufficient evidence on which the jury could have found that Flowers caused a great risk of death to people other than his intended victim, Bertha Tardy. Further, because Flowers shot four victims in the same room, the evidence was sufficient to warrant the instruction. *Jackson*, 672 So.2d at 490

¶ 175. Flowers also claims that "to allow the same conduct that is an essential element of the underlying crime to also aggravate that crime for sentencing purposes" violates the Eighth Amendment. Flowers does not cite any authority for this proposition, nor does he explain how the aggravator violates the Eighth Amendment. The State understands Flowers's argument to be that use of the aggravator violates double jeopardy. We have held specifically that the "great risk" aggravator does not violate double jeopardy. *See Corrothers*, 148 So.3d at 320 (¶¶ 117–19) (quoting *Flowers II*, 842 So.2d at 561–62 (¶ 94) (quoting *Wilcher v. State*, 697 So.2d 1087, 1105 (Miss. 1997))). The Court also has held that "doubling"—the use of an element of the underlying crime as an aggravating circumstance—does not violate the Constitution. *See Corrothers*, 148 So.3d at 320 (¶ 116); *Gillett*, 56 So.3d at 510 (¶ 118); *Ross I*, 954 So.2d at 1014 (¶ 120). Accordingly, the issue is without merit.

**2. Armed Robbery for Pecuniary Gain**

¶ 176. Flowers claims that the trial court erred by instructing the jury to consider the aggravating factor of armed robbery for pecuniary gain because the instruction essentially combined two aggravating factors. The instruction given to the jury stated, in part: "Consider only the following elements of aggravation in determining whether the death penalty should be imposed: . . . The capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain." Mississippi Code Section 99–19–101(5) lists ten aggravating factors the jury may consider during the penalty phase of capital punishment cases. One factor listed is the capital offense occurring while in the commission of any robbery. Miss. Code Ann. § 99–19–101(5)(d) (Rev. 2015). A separate factor is commission of the capital offense for pecuniary gain. Miss. Code Ann. § 99–19–101(5)(f) (Rev. 2015).

¶ 177. Flowers recognizes that the Court previously has found similar aggravating-circumstances instructions permissible, but he encourages the Court to reconsider its reasoning. In *Howell v. State*, the Court held that it was not error for the following aggravating-circumstance instruction to be given to the jury: "The capital offense was committed for pecuniary gain during the course of an armed robbery." *Howell*, 860 So.2d at 756 (¶ 186). The Court noted that the jury is not permitted to "doubly weigh" aggravating circumstances; thus, listing armed robbery and pecuniary gain as *separate* aggravating circumstances could be

unconstitutional in some factual circumstances. *Id.* at 756 (¶ 188) (quoting *Turner v. State*, 732 So.2d 937, 954–55 (¶¶ 71–72) (Miss. 1999)). When pecuniary gain and armed robbery are used within the *same* factor, however, the concern of the jury "doubly weighing" the aggravating factors is not present. As such, the issue is without merit.

### 3. Avoiding Lawful Arrest or Effecting an Escape from Custody

¶ 178. Flowers claims that the trial court erred by instructing the jury that it could consider that the capital offense occurred for the purpose of avoiding or preventing arrest as an aggravating factor, because the evidence presented at trial was insufficient to support the instruction. Flowers also claims that the definition of avoiding arrest is unconstitutional because it is overly broad. Whether the avoiding arrest aggravator is constitutional has been addressed several times, and we consistently have held that it is not overly broad. *Brawner v. State*, 947 So.2d 254, 266 (¶ 36) (Miss. 2006) (collecting cases).

¶ 179. The factor is appropriate where "the accused purposefully killed the victim of the underlying felony to avoid or prevent arrest for that felony." *Id.* at 266 (¶ 37). Further,

> [i]f there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or to "cover their tracks" so as to avoid

> apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.

*Id.* (quoting *Wiley v. State*, 750 So.2d 1193, 1206 (¶ 46) (Miss. 1999)). In *Wiley*, the defendant shot and killed a witness to a robbery and injured another witness. *Wiley*, 750 So.2d at 1206 (¶ 47). The Court found that, because the defendant knew the victims and attempted to dispose of evidence linking him to the robbery, there was sufficient evidence to support the aggravating factor. *Id.* at 1206 (¶ 48). Like the defendant in *Wiley*, Flowers knew the murder victims. Further, the murder weapon was never found, nor were the Fila Grant Hill tennis shoes. However, a Fila Grant Hill shoebox was found at Flowers's girlfriend's house, and Flowers had been seen wearing Fila Grant Hill shoes. Cash was found hidden in Flowers's headboard, and Flowers gave conflicting statements to police regarding his whereabouts on the morning of the murders. In *Wiley*, the Court held that the defendant's "efforts to dispose of and/or conceal the evidence of his crime [were] sufficient to support the avoiding arrest instruction." *Id.* at 1206 (¶ 48). In the instant case, it could be "reasonably inferred" that Flowers attempted to conceal his identity, disposed of evidence, or tried to "cover his tracks." The evidence is sufficient to support the avoiding-arrest instruction.

## X. Whether Flowers's multiple trials violated the Double Jeopardy Clause and the Due Process Clause of the Fourteenth Amendment.

¶ 180. Flowers claims that his six trials for the Tardy Furniture murders violate his due process rights and the Double Jeopardy Clause. Flowers's first and second trials resulted in convictions and death sentences that subsequently were overturned by the Court for various instances of prosecutorial misconduct. *Flowers I*, 773 So.2d 309; *Flowers II*, 842 So.2d 531. At his third trial, Flowers again was convicted and sentenced to death, but the Court reversed and remanded for a new trial for a *Batson* violation. *Flowers III*, 947 So.2d 910. At Flowers's fourth and fifth trials, the juries was unable to reach unanimous decisions, and the trials resulted in mistrials. Prior to today's case, Flowers moved to have the case dismissed as a violation of his due process rights and the Double Jeopardy Clause; the trial court denied the motion. Claims of double jeopardy are reviewed de novo. *Rowland v. State*, 98 So.3d 1032, 1037 (¶ 9) (Miss. 2012) (quoting *Foreman v. State*, 51 So.3d 957, 960 (¶ 8) (Miss. 2011)).

¶ 181. The Double Jeopardy Clause of the Mississippi Constitution reads: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution." Miss. Const. art. 3, § 22. Likewise, the Fifth Amendment to the United States Constitution provides that never "shall any person be subject for the same offence to be twice

put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause does not bar reprosecution when a conviction has been set aside on appeal. *Green v. United States*, 355 U.S. 184, 189, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Also, jeopardy does not attach when a criminal case ends by the jury failing to reach a unanimous verdict. *Id.* at 188, 78 S.Ct. 221. *See also Richardson v. United States*, 468 U.S. 317, 323–24, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Keerl v. Montana*, 213 U.S. 135, 137–38, 29 S.Ct. 469, 53 L.Ed. 734 (1909). "Double jeopardy consists of three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense." *Powell v. State*, 806 So.2d 1069, 1074 (¶ 8) (Miss. 2001) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). Flowers has not been acquitted, his convictions have not been upheld on appeal, and he has not received multiple punishments. Therefore, the Double Jeopardy Clause has not been implicated.

¶ 182. Flowers also claims that continued trials, despite the reversals in his first three direct appeals on the bases of prosecutorial misconduct, violate his due process rights. We have not addressed whether multiple trials result in a due process violation, but other courts have held that multiple retrials do not violate a defendant's due process rights when implications of double jeopardy are not at issue. *See People v.*

*Sierb*, 456 Mich. 519, 581 N.W.2d 219, 223–25 (1998);[7] *United States v. Jones*, 122 F.3d 1058 (2d Cir. 1997). *See also United States v. Faulkenberry*, 461 Fed.Appx. 496, 503 (6th Cir. 2012); *United States v. Andrews*, 2 F.Supp.3d 847, 853 (N.D. W. Va. 2014); *Wallin v. Sinclair*, 2013 WL 2338259 (W.D. Wash. 2013); *Whiteside v. Warden, S. Ohio Corr. Facility*, 2011 WL 5551598 (S.D. Ohio 2011). Further, the United States Supreme Court has held that the Due Process Clause does not provide greater protection against double jeopardy than the Double Jeopardy Clause itself. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 116, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). The Court wrote:

> At bottom, petitioner's due-process claim is nothing more than his double-jeopardy claim in different clothing. As we have said: "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes

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[7] In *People v. Sierb*, the Michigan Supreme Court recognized that a rule prohibiting retrial on the basis of a due process violation would lead to problems with arbitrary application: "[I]f recognized, guidelines for responsible decision making in applying the new remedy would be scarce and open-ended. If three trials are too many under substantive due process, why are not two? It could follow that either any retrial after a mistrial is barred as a violation of substantive due process, or that the theory as applied would result in arbitrary assertion of judicial authority." *Sierb*, 581 N.W.2d at 224.

> between liberty and order." *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). We decline petitioner's invitation to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.

*Id. See also United States v. Neto*, 659 F.3d 194, 201 (1st Cir. 2011) (the Due Process Clause of the Fifth Amendment does not supplement the protections provided by the Double Jeopardy Clause). Flowers's due process claim is an attempt to supplement the protections of the Double Jeopardy Clause. Because the double jeopardy protections have not been violated, Flowers cannot assert a due process claim on the same grounds. The issue is without merit.

## XI. Whether the convictions and death sentences were obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their counterparts in the Mississippi Constitution.

¶ 183. Flowers presents several contentions of error related to his indictments, the admissibility of victim-impact testimony, and the constitutionality of the death penalty. Flowers claims that the trial court should have precluded the State from seeking the death penalty because of the alleged lack of evidence. Because there was sufficient evidence to support a conviction, the issue is without merit. *See* Issue IV *supra*. Flowers also asserts that his right to a speedy trial was

violated for the Carmen Rigby and Robert Golden convictions, but he provides no support for that contention. As such, the issue is without merit. *See Byrom v. State*, 863 So.2d 836, 853 (¶ 35) (Miss. 2003) ("failure to cite relevant authority obviates the appellate court's obligation to review such issues").

### A. Whether it was constitutional to try Flowers for all four murders in the same trial despite there being four, single-count indictments.

¶ 184. Flowers claims that it was error for him to be tried for all four murders at a single trial when there were four, single-count indictments rather than a multicount indictment. He further claims that the trial court erred in not entering an order consolidating the four cases or obtaining a statement waiving the multicount indictment. Flowers concedes that he did not object at trial to proceeding under the four, single-count indictments, but he claims that the issue is one of plain error.

¶ 185. At his first trial, Flowers filed a motion to consolidate the four murder indictments into one trial, but the trial court denied the motion. *Flowers I*, 773 So.2d at 318 (¶ 26). During Flowers's third trial, the trial court announced that the parties had agreed to consolidate the four cases. *See Flowers III*, 947 So.2d at 916 (¶ 5). Flowers's fourth, fifth, and sixth trials were for all four murders.

¶ 186. In his brief, Flowers claims that Mississippi Code Section 99–7–2 requires that he should have been charged under a multicount indictment and/or that the trial court should have entered an order consolidating the matters. Section 99–7–2 does not include either of the alleged requirements; rather, it includes permissive language allowing—but not requiring—the trial court to proceed under a multicount indictment. Section 99–7–2 reads in its entirely [sic]:

> (1) Two (2) or more offenses which are triable in the same court *may* be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (2) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges *may* be tried in a single proceeding.
>
> (3) When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction.
>
> (4) The jury or the court, in cases in which the jury is waived, shall return a separate verdict for each count of an indictment drawn under subsection (1) of this section.
>
> (5) Nothing contained in this section shall be construed to prohibit the court from

> exercising its statutory authority to suspend either the imposition or execution of any sentence or sentences imposed hereunder, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or any other sentence or sentences previously imposed upon the defendant.

Miss. Code Ann. § 99–7–2 (Rev. 2014) (emphasis added). In 2002, the Court of Appeals addressed whether a defendant is entitled to a multicount indictment. *Brooks v. State*, 832 So.2d 607, 610–11 (Miss. Ct. App. 2002). In *Brooks*, the defendant was charged with two counts of sale of cocaine in separate indictments and claimed on appeal that he should have been charged under a multicount indictment. *Id.* at 608, 610 (¶¶ 1, 13). The court held that single-count indictments were permissible:

> [The defendant] argues the cocaine sales were part of a common scheme; therefore, he should have been charged in a multi-count indictment. [The defendant] is incorrect. Separate indictments are the usual practice in Mississippi, while multi-count indictments are exceptional. Mississippi Code Annotated § 99–7–2–(1) (Rev. 2000) provides the three exceptional situations in which a multi-count indictment *may* be brought: "(1) the offenses are based on the same act or transaction; or (2) the offenses are based on two (2) or more acts or transactions connected together; or (3) the offenses are based on two (2) or more acts or transactions constituting parts of a common

> scheme or plan." *Id.* A basic tenet of statutory construction is that the word "shall" is a mandatory directive, and the word "may" is discretionary in nature. *American Sand and Gravel Co. v. Tatum*, 620 So.2d 557, 563 (Miss. 1993); *Planters Bank & Trust Co. v. Sklar*, 555 So.2d 1024, 1027 (Miss. 1990). In this case, the State could have brought a multi-count indictment but was not required to do so.

*Id.* at 610 (¶ 13). Flowers provides no other authority for his proposition that a multi-count indictment was required.

¶ 187. Flowers also claims that the trial court erred by not entering an order consolidating the matters and/or obtaining a waiver from Flowers "to be tried on only a single count indictment." In support of his argument, Flowers cites *State v. Berryhill*, 703 So.2d 250 (Miss. 1997), and *Woods v. State*, 200 Miss. 527, 27 So.2d 895, 896–97 (1946). Neither case supports Flowers's contention. *Berryhill* stands for the proposition that "capital murder indictments that are predicated upon the underlying felony of burglary must assert with specificity the felony that comprises the burglary." *Berryhill*, 703 So.2d at 258. And, although the Court in *Woods* found that the trial court erred by allowing the State to consolidate for trial three separate crimes—exhibiting a deadly weapon, carrying a concealed weapon, and assault and battery with fists—the case is distinguishable from Flowers's case. *Woods*, 27 So.2d at 897. In *Woods*, the Court noted that the three crimes contained different elements and

the different elements led to a possibility of prejudice for the defense:

> the accused had to be prepared to meet evidence of three distinct crimes, where much of the evidence as to one was not competent as to the others. Certainly the accused was confounded in his defense and evidence was introduced before the jury which would not have been competent upon separate trials.

*Id.* The concern present in *Woods*—that the defendant would have to defend three distinct crimes—is not present in today's case. Flowers was charged with four counts of capital murder with the underlying felony of armed robbery. Because proceeding under single-count indictments is permitted, the issue is without merit.

**B. Whether the trial court erred by refusing Flowers's motion to quash the indictment for failure to allege an aggravating circumstance and/or the *mens rea* requirement.**

¶ 188. Flowers claims that his indictments were constitutionally insufficient because they failed to list the aggravating factors and/or the *mens rea* requirement. As mentioned above, Flowers was charged with the murders in four single-count indictments. Aside from the victims' names, each indictment contained identical language. The indictments read, in part:

> CURTIS GIOVANNI FLOWERS late of Montgomery County, Mississippi, on or about the

> 16th day of July, 1996, in the county and state aforesaid, and within the jurisdiction of this Court, alone or while acting in concert with another or others, did unlawfully, wilfully, feloniously, and either with or without the deliberate design to effect death, kill and murder [the victim], a human being, by shooting her with a pistol, while engaged in the commission of the felony crime of armed robbery in violation of Miss. Code Ann. Section 97–3–79 and Section 97–3–19(2)(e) [as amended] against the peace and dignity of the State of Mississippi.

¶ 189. Flowers claims that the indictments were insufficient under the United States Supreme Court's holdings in *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 605–06, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We addressed the same argument in *Pitchford* and said that we have held repeatedly that "these cases have no application to Mississippi's capital murder sentencing scheme." *Pitchford*, 45 So.3d at 258 (¶ 184). The indictment in *Pitchford* was almost identical to Flowers's indictments. *See id.* at 257–58 (¶ 183). The *Pitchford* Court provided the following regarding the Court's refusal to apply *Apprendi* and *Ring* to the issue:

> This Court repeatedly has rejected this type of argument. We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. The purpose of an indictment is

> to furnish the defendant with notice and a reasonable description of the charges against him so that he may prepare his defense. An indictment is required only to have a clear and concise statement of the elements of the crime with which the defendant is charged.
>
> Under Mississippi law, the underlying felony that elevates the crime to capital murder must be identified in the indictment along with the section and subsection of the statute under which the defendant is being charged. In addition, our death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment.
>
> When [the defendant] was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required.

*Pitchford*, 45 So.3d at 258 (¶ 184) (quoting *Goff v. State*, 14 So.3d 625, 665 (¶¶ 174–77) (Miss. 2009) (citations omitted)). Because Flowers's indictments provided him with "notice and a reasonable description of the charges against him so that he may prepare his defense," the issue is without merit.

### C. Whether the trial court erred by not declaring Mississippi Code Section 97–3–19(2)(e) unconstitutional and/or by not precluding the prosecution from relying on Mississippi Code Section 99–19–101(5)(d) as an aggravating circumstance.

¶ 190. Flowers claims that Mississippi Code Section 97–3–19(2)(e) is unconstitutional because it allows for an "arbitrary and capricious" application of the death penalty, since cases of deliberate design and depraved heart murder are not death penalty eligible when felony murder is death penalty eligible. He further contends that the application of Mississippi Code Section 99–19–101(5)(d) as an aggravating factor is unconstitutional because the underlying felony—armed robbery—made the case eligible for the death penalty. Therefore, Flowers claims that the underlying felony cannot also be used as an aggravating circumstance. We have discussed both of the issues in past opinions.

¶ 191. In *Batiste*, the defendant claimed that Mississippi's death-penalty scheme was unconstitutional "because it [did] not allow the death penalty in cases of simple murder, no matter how premeditated or atrocious." *Batiste*, 121 So.3d at 872 (¶ 181). We held that Batiste was not entitled to relief because "the death penalty in Mississippi does not violate the U.S. Constitution." *Id.* (quoting *Gillett*, 56 So.3d at 525 (¶ 168)). We also have addressed whether the underlying felony may be considered an aggravating

circumstance, and we have held that use of the underlying felony as the aggravating circumstance is appropriate. *See Manning*, 735 So.2d at 350–51 (¶ 67). Further, the use of an underlying felony as an aggravating circumstance has been upheld by the United States Supreme Court. *See Lowenfield v. Phelps*, 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). For the above reasons, the issue is without merit.

### D. Whether the trial court erred in permitting victim-impact testimony.

¶ 192. During the penalty phase, four witnesses provided victim-impact testimony—Roxanne Ballard, Bertha Tardy's daughter; Brian Rigby, Carmen Rigby's son; Kathy Permenter, Derrick Stewart's mother; and Willie Golden, Robert Golden's brother. Flowers contends that the trial court erred in permitting victim-impact testimony during the penalty phase because the testimony did not relate to the statutory aggravating factors. Flowers also claims that the admission of victim-impact testimony violated the Eighth Amendment.

¶ 193. Recently, in *Batiste*, we held that victim-impact testimony did not violate the Eighth Amendment:

> Victim impact statements are those which describe the victim's personal characteristics, the emotional effect of the crimes on the victim's family, and the family's opinions of the crimes and the defendant. *Edwards v. State*,

> 737 So.2d 275, 291 (Miss. 1999). The United States Supreme Court has held that there is no *per se* bar to victim-impact testimony. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (Miss. 1991). This testimony is admissible at the sentencing phase, but not in the culpability phase. *Havard v. State*, 928 So.2d 771, 792 (Miss. 2006). We will allow relevant victim-impact testimony in narrow circumstances as is constitutionally permissible. *Id.* When the evidence is proper, necessary to a development in the case and the true characteristics of the victim, and could not incite the jury, the testimony is admissible. *Id.* (quoting *Jenkins v. State*, 607 So.2d 1171, 1183 (Miss. 1992)). . . . We decline to disregard the United States Supreme Court's pronouncement in *Payne*, and will continue to adhere to the standard enunciated above.

*Batiste*, 121 So.3d at 864 (¶ 147). On several occasions, we have permitted victim-impact testimony that described the impact of the victim's death on his or her family. *See Keller v. State*, 138 So.3d 817, 865 (¶ 131) (Miss. 2014); *Batiste*, 121 So.3d at 864 (¶ 148); *Havard v. State*, 928 So.2d 771, 792 (¶ 37) (Miss. 2006); *Branch v. State*, 882 So.2d 36, 68 (¶¶ 96–97) (Miss. 2004). In *Havard*, the Court found that it was not error to admit the testimony of the victim's grandmother, who stated, "[j]ustice means [the victim's] life was taken, and there is only one way that we can find justice. . . . A life for a life." *Havard*, 928 So.2d at 792 (¶ 36). The Court noted, however, that the "vast majority" of the witness's testimony "went straight to the relationships between her

family members, including [the victim], and the impact losing [the victim] had on them, all part of permissible testimony under our case law." *Id.* at 792 (¶ 37).

¶ 194. Flowers cites *Berry v. State* for the proposition that victim-impact testimony must be relevant to a statutory aggravating circumstance, and that case does provide that victim-impact testimony is admissible "if it is necessary to develop the case, and if it is relevant to any of the aggravating circumstances." *Berry*, 703 So.2d at 275–76. However, we rejected the same argument in *Keller v. State*. In *Keller*, the defendant cited *Berry* and argued that victim-impact testimony was not permissible when "it did not relate to any of the aggravating factors." *Keller*, 138 So.3d at 865 (¶ 129). The testimony in *Keller* described "the emotional effect of the crime on the victim's son and his opinion of the crime." *Id.* at 865 (¶ 131). Despite the statement in *Berry*, we held that the testimony was "permissible under the Court's precedent on victim-impact statements." *Id.*

¶ 195. In today's case, the victim-impact testimony was consistent with the testimony presented in *Keller* and *Havard*. At the sentencing phase, Roxanne Ballard testified about her relationship with her mother and the effect her mother's death had on her life. Likewise, Brian Rigby, Kathy Permenter, and Willie Golden testified about the impact their family members' deaths had on them and their families. The above-described type of victim-impact testimony is permissible, and the issue is without merit.

## XII. Whether the death sentence in the instant matter is constitutionally and statutorily disproportionate.

¶ 196. Mississippi Code Section 99–19–105(3) requires the Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Miss. Code Ann. § 99–19–105(3) (Rev. 2015). The Court consistently has "upheld the death penalty in cases involving capital murders committed during the commission of a robbery." *Batiste*, 121 So. 3d at 873 (¶ 183) (citing *Gillett*, 56 So.3d at 524; *Fulgham*, 46 So.3d at 323; *Goff*, 14 So.3d at 650; *Chamberlin v. State*, 989 So.2d 320, 345 (Miss. 2008); *Doss v. State*, 709 So.2d 369, 401 (Miss. 1997); *Chase v. State*, 645 So.2d 829, 836–37 (Miss. 1994)). Further, the Court has upheld the imposition of the death penalty in cases involving multiple victims. *See Manning*, 765 So.2d at 522 (¶ 17). As such, the issue is without merit.

## XIII. Whether the Court should set aside its prior order denying Flowers's motion for remand and leave to file supplemental motion for new trial.

¶ 197. In May 2012, Flowers filed a motion for remand and leave to file supplemental motion for new trial on the basis that the State failed to disclose information relating to the credibility of one of its witnesses, Patricia Hallmon Sullivan Odom. Approximately four months prior to the start of Flowers's sixth trial, a federal grand jury indicted Odom for tax fraud. Odom's

trial was in September 2010—three months after Flowers's trial. Flowers contends that the State should have disclosed Odom's indictment. Flowers's motion was based on the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In response to Flowers's motion, the State claimed that the issue should not be presented to the Court through motion or direct appeal because the issue was not presented to the trial court. The State also submitted District Attorney Doug Evans's affidavit, which provided that he was not aware of Odom's indictment until after Flowers's trial. The Court denied Flowers's motion. Because the issue was not presented to the trial court, it is not proper on appeal.

## XIV. Whether the cumulative effect of the errors mandates reversal of the verdict and/or the sentence of death entered pursuant to it.

¶ 198. Flowers claims that, even if the Court has doubts about the harm of any one error in isolation, the cumulative effect of the errors warrants reversal. Certainly, the Court often has applied the cumulative-error doctrine in capital cases where, "although no error, standing alone, requires reversal, the aggregate effect of various errors may create such an atmosphere of

bias, passion[,] and prejudice that they effectively deny the defendant a fundamentally fair trial." *Goff*, 14 So.3d at 672 (¶ 210) (citation omitted). That is not the case here. We have thoroughly reviewed the briefs, arguments, record, and trial transcript, and we have determined that each issue raised by Flowers is without merit. Therefore, as there are no individual errors, there is no cumulative error.

**Conclusion**

¶ 199. Each issue raised by Flowers is without merit. Flowers's four convictions for capital murder and sentences to death were properly decided by the jury, and we affirm.

¶ 200. **AFFIRMED.**

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RANDOLPH, P.J., MAXWELL, BEAM AND CHAMBERLIN, JJ., CONCUR. WALLER, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J., AND ISHEE, J. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, P.J.; WALLER, C.J., JOINS IN PART.

WALLER, CHIEF JUSTICE, DISSENTING:

¶ 201. Because the prosecution's mischaracterizations of the evidence during closing arguments affected Flowers's fundamental right to a fair trial, I respectfully dissent.

¶ 202. Prosecutors are afforded the right to argue facts that are in evidence. *Henton v. State*, 752 So.2d 406, 409 (¶ 11) (Miss. 1999). "However, arguing statements of fact that are not in evidence or necessarily inferable from it which are prejudicial to the defendant is error." *Dancer v. State*, 721 So.2d 583, 589 (¶ 31) (Miss. 1998). As discussed by Justice King, the prosecution in this case mischaracterized evidence during closing arguments. Two of those misstatements—the timing of Sam Jones's arrival at Tardy's and Flowers's motive—the prosecution similarly used in *Flowers II*, where we found reversible error. *Flowers v. State*, 842 So.2d 531, 555 (¶ 71) (Miss. 2003) (*Flowers II*).

¶ 203. While it is true that fourteen prosecutorial misstatements were alleged in *Flowers II* as opposed to only four misstatements in the case *sub judice*, this Court uses heightened scrutiny when the death sentence is imposed. *Cox v. State*, 183 So.3d 36, 44 (¶ 17) (Miss. 2015). "This higher level of scrutiny requires that all doubts be resolved in favor of the accused because 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" *Bennett v. State*, 933 So.2d 930, 939 (¶ 17) (Miss. 2006) (citations omitted). Applying heightened scrutiny, I find plain error in the prosecution's mischaracterizations, particularly given our admonishments in *Flowers II*. Therefore, I would reverse the judgment in this case and remand for a new trial.

KITCHENS, P.J., AND ISHEE, J., JOIN THIS OPINION.

KING, JUSTICE, DISSENTING:

¶ 204. In two previous direct appeals, this Court has reversed Flowers's conviction and death sentence as a result of prosecutorial misconduct. In *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*), the prosecution's argument of facts not in evidence resulted in reversal. Finding that a *Batson*[8] violation had occurred, this Court reversed and remanded *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (*Flowers III*), for a new trial. Despite the same errors occurring in the trial that is the subject of this appeal, the Majority, in a stark departure from this Court's previous *Flowers* opinions, found that Flowers's conviction and death sentence should be affirmed. The United States Supreme Court then granted Flowers's petition for a writ of certiorari, vacated our judgment, and remanded the case (a "GVR") to this Court for further consideration. The United States Supreme Court finds that a GVR is potentially appropriate

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability* that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that

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[8] *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

> such a redetermination may determine the ultimate outcome of the litigation[.]

*Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (emphasis added). To put it simply, the United States Supreme Court issued a GVR in this case because a majority of its members believed that a reasonable probability exists that this Court got it wrong on the first try. Yet, this Court ignores that strong implication and makes the same erroneous decision on remand. Because the errors in this case, particularly the denial of Flowers's *Batson* claims highlighted by the United States Supreme Court, resulted in Flowers being denied his right to a fair trial, I dissent.

## I. Prosecution's Argument of Facts Not in Evidence

¶ 205. Three instances of the prosecution arguing facts not in evidence appear in today's case: (1) the prosecution misstated the time Sam Jones discovered the victims' bodies at Tardy's; (2) the prosecution stated an unsupported basis for Flowers's alleged motive; and (3) the prosecution incorrectly described Porky Collins's reaction to the photo arrays. In *Flowers II*, 842 So.2d at 550, the prosecution's misstatement of facts during closing argument was one basis, *inter alia*, for this Court's reversal. In that appeal, Flowers cited approximately fourteen alleged misstatements. *Id.* at 555. This Court found that the following misstatements by the prosecutor resulted in an unfair trial:

(1) that defense witnesses tried to coerce the State's witnesses to lie; (2) that Sam Jones received a call at 9:30 a.m. from Bertha Tardy asking him to come to the store; and (3) that Flowers "was mad" about losing his job and having his pay docked. *Id.* at 555–56.

¶ 206. The statements that resulted in this Court reversing Flowers's conviction and death sentence in *Flowers II* are notably similar to the statements raised in today's case. While this repetition of prosecutorial misconduct is alarming, the Majority's approval of the same is even more startling. Courts have long recognized—and reasonably feared—that misconduct during closing argument may become commonplace in our trial courts. Despite regular admonishments, such misconduct still occurs:

> That despite our consistent warnings to the Government we should still be called upon to admonish against such conduct is reprehensible per se because it constitutes a disregard for our directives. But additionally it is particularly pernicious because it results in an unnecessary waste of judicial resources, both at the trial and appellate level, by diversion and attention to review of what now should be understood to be totally unacceptable conduct by those who lay claim to representing the Government. . . .

*U.S. v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983). The Majority in today's case, by endorsing the prosecutor's misstatements—the same misstatements which warranted reversal in *Flowers II*—takes Mississippi one

step closer to having misrepresentation of the facts presented at trial commonplace in our trial courts.

### A. Sam Jones's Testimony Regarding His Arrival at Tardy's

¶ 207. Sam Jones died prior to Flowers's 2010 trial, and his testimony from Flowers's 2007 trial was read into evidence. Flowers claims that the State misrepresented Jones's testimony regarding the timeline of events the morning of the murders. Jones testified as follows:

> A. Well, [Bertha Tardy] called me and asked me—I had promised her I would come down and help them load out a truck and go on a delivery. And she called me to ask me about was I coming down there. And I told her that I was. And then about, that was about 15 minutes after 9:00, I think, when she called, somewhere along in there.
>
> Q. About what time did you get to the store that morning, Mr. Jones?
>
> . . . .
>
> A. I got to the store; it was before—it was right at, between 9:15 and 9:30.
>
> Q. Okay.
>
> A. I will put it like that. It wasn't 9:30.
>
> Q. Okay. You got to the store between 9:15 or right around that time?

A. Yes.

Although Jones testified that he arrived at Tardy's between 9:15 and 9:30 a.m., the State attempted to question Jones later about the timeline and misstated that he arrived closer to 10:00 a.m.:

> Q. Okay. And I think—I might have misled you a little bit. It was, when you got to the store, that was going to be closer on up to 10 o'clock, wasn't it?
>
> Flowers's Counsel: Object to leading, Your Honor.
>
> Court: Overruled.

Jones never responded to this question.

¶ 208. In its closing argument, the State discussed the timeline for the morning of the murders and apparently put the timeline on some type of marker board. During the timeline discussion, the prosecution stated: "Mr. Sam Jones came into the store slightly after 10:00 on the morning of the 16th and discovered the bodies." Flowers did not object to this statement at closing argument.

¶ 209. In *Flowers II*, 842 So.2d at 511, this Court addressed whether this same issue was procedurally barred by lack of contemporaneous objection. This Court applied plain error to the issue, and found that the prosecution's misstatements warranted reversal. *Id.* "The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice." *Williams v. State*, 794

So.2d 181, 187 (Miss. 2001) (citing *Gray v. State*, 549 So.2d 1316, 1321 (Miss. 1989)), *overruled on other grounds by Foster v. State*, 148 So.3d 1012 (Miss. 2014).

¶ 210. In *Flowers II*, 842 So.2d at 555, the prosecution stated that Sam Jones had testified that Bertha Tardy had called him at 9:30 a.m. Reviewing this statement, this Court stated:

> After a thorough examination of the record, it is clear from Jones's testimony that he testified he arrived at Tardy's at 9:30. He never once stated he was called at 9:30 on the morning of July 16, but he did testify he arrived at the store around 9:30. On direct examination, the State never questioned Jones about a specific time. He only stated he received a call from Mrs. Tardy on the morning of July 16. On cross-examination, Jones was asked what time he arrived at Tardy's, and he answered it was around 9:30.

*Id.* at 556. This Court then found that "[t]he cumulative effect of the State's repeated instances of arguing facts not in evidence was to deny Flowers his right to a fair trial." *Id.*

¶ 211. Flowers claims that the statement in today's case prejudiced him by essentially skewing the timeline in the State's favor. Porky Collins and Clemmie Flemming both testified that they saw Flowers near Tardy's around 10:00 a.m. Flowers claims that if Jones's testimony had been accurately described—that he arrived at the store between 9:15 and 9:30—the question of what Flowers was doing so close to the

scene of a murder thirty to forty-five minutes after the murders could have occurred would have been raised in the jurors' minds.

¶ 212. There is no doubt that the prosecutor's statement is not supported by Sam Jones's testimony and that there is no direct evidence supporting the contention that Jones arrived at Tardy's at 10:00 a.m. The prosecution's statement is not based on facts and prejudiced Flowers by deliberately painting an incorrect picture for the jury of the events surrounding the discovery of the murders—this same picture was painted in *Flowers II*.

### B. Flowers's Motive

¶ 213. The second misstatement Flowers cites relates to his alleged motive to commit the murders. Similar to Sam Jones's testimony and the timeline described above, misstatements related to Flowers's motive were another basis for this Court's reversal in *Flowers II*, 842 So.2d at 556. In *Flowers II*, 842 So.2d at 555–56, this Court found that the prosecution's statement that Flowers "was mad" as a result of losing his employment with Tardy's was a misstatement of the facts:

> [T]he prosecutor argued to the jury that [Robert] Campbell had testified that Flowers was mad because Mrs. Tardy had terminated his employment and was holding money out of his paycheck to cover the damaged batteries. Defense counsel objected on the basis that the

> prosecutor was mischaracterizing Campbell's testimony, and when the prosecutor responded that he was quoting verbatim from his notes, the trial court overruled the defense objection. . . . After a thorough examination of Campbell's testimony, it is clear Campbell never testified Flowers was upset at Mrs. Tardy. The State never questioned Campbell about Flowers's feelings toward Tardy or about any money. On redirect, Campbell was asked if Flowers ever mentioned anything was wrong with Mrs. Tardy, and Campbell stated Flowers never mentioned anything to him.

*Id.*

¶ 214. In today's appeal, Flowers claims that the following statement by the prosecutor was not based on facts in evidence:

> The investigators learned pretty quickly when they asked who in the world could have had some reason, some motive, some anything to attack four people like this.
>
> **Have you had anybody that's had beef with the store? Just one.** Well, that doesn't mean he did this though, does it? No. But you check that out. You look at him. And in the course of deciding what, if anything, Curtis Flowers had to do with this crime.

Flowers claims that no evidence was presented at trial supporting the contention that he was angry as a result of his termination. In response, the State argues

that the following supports the contention that Flowers "had beef" with Tardy's:

1. Flowers losing his job days prior to the murders.

2. Bertha Tardy deducting the cost of damaged inventory from Flowers's paycheck.

3. Police Chief John Johnson's testimony that the Tardy family considered Flowers a threat:

> Q. Okay. How did Curtis Flowers become a suspect by then, by 6:30?
>
> A. I knew that the Tardy family had considered Curtis a threat and that they were concerned about their safety dealing with him.

4. Investigator Jack Matthew's testimony about employees who had been fired from Tardy's:

> Q. You asked who else had worked there the last couple of years and those kind of things?
>
> A. Well, we asked if there was anybody that they'd had any problem with or anybody that had been fired from there, and that was the—Curtis was the only one.

5. Doyle Simpson's testimony that Flowers had "problems" with Tardy's:

> Q. Okay. Did you know anything about Curtis having any problems with Tardy Furniture.
>
> A. I had heard about it.

¶ 215. This evidence cited by the State supports the contention that Tardy's employees were concerned about Flowers. But the feelings and perceptions of Tardy's employees must be distinguished from Flowers's perception. The statements cited by the State do not establish that Flowers had ill will toward Tardy's employees. Further, Doyle Simpson's testimony is too vague to support a statement that Flowers "had beef" with the store. "Problems" could easily refer to the firing itself or the damaged inventory. The State's contention that Flowers "had beef" with Tardy's is unsupported by the facts. As this Court recognized in *Flowers II*, this factually unsupported statement resulted in Flowers having an unfair trial.

### C. Porky Collins's Response to Photo Arrays

¶ 216. Next, Flowers claims that the prosecutor misrepresented Porky Collins's response to the first photo array—the array that contained a photograph of Doyle Simpson. Flowers claims that this misrepresentation was particularly prejudicial because part of his defense was based on the alternative theory that Doyle Simpson was the perpetrator. Collins saw two

African-American men arguing outside Tardy's the morning of the murders. When Collins testified, he stated that he did not remember if he identified Simpson as one of the men standing outside Tardy's. The notes taken during the photo arrays state that Collins had the following reaction to the array containing Simpson's photo:

> # 1 and # 3 resembles, but hairline was further back
>
> # 6 pointed to Simpson, said hairline like this, may have appeared a little darker.
>
> "But it looks like him."
>
> "Face was also same shape, round like this."
>
> "Unable to be positive."

Investigator Wayne Miller testified that Collins did point out Simpson during the photo array:

> Q. All right. So he did actually point out Mr. Simpson here as somebody who was—looks like the person he'd seen; is that a fair characterization?
>
> A. Right.

¶ 217. The State presented the following closing argument related to Collins's identifications:

> When Porky found out that some people had been murdered in front of Tardy's, he told James Taylor Williams. He said I saw something I think y'all ought to know about. He

said I think I can identify that guy if I see him again. Now, here's the interesting thing about Mr. Porky Collins. Porky didn't know Curtis. Never claims to have ever seen him before. Didn't know him. Didn't know those other people, as far as them having seen him. Porky says I can identify him.

I'm going to refer to this some more in a minute but I just want you to—you've seen these. We had them passed to y'all. Here are two line-ups. These line-ups were shown to Porky at the same setting. First was this one that has Doyle Simpson's picture on it. Because later on when they did this line-up, they already knew that the gun came out of Doyle's car. And so they gave this thing to Porky first and said is the guy that you saw in front of Tardy's in this group.

Now, if he was going to make a misidentification, ladies and gentlemen, that would have been the perfect time for him to pick one of these guys and say yeah, there he is right there. But you know what? Porky did not misidentify anybody. **He said the guy ain't there.** They took another six photographs and said look at this second set. He said that's him right there. You heard Mr. Miller talk about Porky, said he was positive. He made a positive identification.

Now, why is Porky's i.d.—Porky doesn't know him. Porky wasn't able to say yeah, I know him. When he saw the photograph of Curtis Flowers, he pointed him out. So you have got

two different kinds of identifications and they agree. You've got identification by all these witnesses who knew him, Porky, who didn't know him, and they both agree. And he was offered—Porky was offered a prime chance to mess up. The perfect chance to make a mistake. He almost—it didn't develop out that way it, but it was almost like a trick.

**You know, see if he is in there. No, he is not.** Is he in the second group? Yeah. That's him right there. So that's a pretty strong identification, isn't it?

¶ 218. While the State correctly characterized Collins's identification of Flowers in the second photo array, the State deliberately failed to recognize Collins's statement that Simpson's photograph in the first array "looks like" a man he saw outside of Tardy's and that he was "unable to be positive." The State's argument that Collins stated "the guy ain't there" was not an accurate representation of Collins's identification. Because Flowers's defense was based, in part, on the argument that Doyle Simpson was a likely suspect for the murders, the State's misstatement regarding Collins's identification of Simpson prejudiced Flowers.

¶ 219. As in *Flowers II*, the prosecution's repeated argument of facts not in evidence in today's case prejudiced Flowers and denied him his right to a fair trial. Under this Court's heightened review of death penalty cases, these misstatements—standing alone—should be enough to warrant reversal. *See Fulgham v. State*, 46 So.3d 315, 322 (Miss. 2010) ("What

may be harmless error in a case with less at stake becomes reversible error when the penalty is death."). This Court's prior admonishment of essentially the same statements in *Flowers II* bolsters a finding of reversal. *See U.S. v. Drummond*, 481 F.2d 62, 62 (2d Cir. 1973) ("Because of the repeated misbehavior of this prosecutor in this and prior cases, we feel compelled to reverse the decision of the trial court on the sole ground of prosecutorial misconduct.").

## II. Jury Selection Process

¶ 220. Flowers claims that the State violated the Equal Protection Clause of the Fourteenth Amendment when it struck five African-American jurors after utilizing disparate questioning and citing pretextual reasons. "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Foster v. Chatman*, ___ U.S. ___, 136 S.Ct. 1737, 1747, 195 L.Ed.2d 1 (2016) (internal quotations omitted). Because a review of the record in today's case reveals that a *Batson* violation did occur, I dissent.

¶ 221. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309, 25 L.Ed. 664 (1880), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Racial prejudice in the prosecution's jury selection results in

"state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 128, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). Thus, for years, courts have held that racial discrimination by the State during the jury selection process violated the Equal Protection Clause. *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (quoting *Georgia v. McCollum*, 505 U.S. 42, 44, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992)).

¶ 222. In an effort to remedy the prejudices existing in jury selections, the United States Supreme Court has, over the years, developed various standards for establishing purposeful discrimination. In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court attempted to regulate purposeful discrimination through presuming the legitimacy of prosecutors' strikes except in the case of longstanding patterns of discrimination—when in case after case no African Americans served on juries, then "giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge [were] being perverted."

¶ 223. *Swain*'s approach did little to remedy the problem of purposeful discrimination in jury selection. Thus, in *Batson*, the United States Supreme Court "held that a defendant could make out a prima facie case of discriminatory jury selection by 'the totality of the relevant facts' about a prosecutor's conduct during

the defendant's own trial." *Miller-El*, 545 U.S. at 239, 125 S.Ct. 2317 (quoting *Batson*, 476 U.S. at 94, 106 S.Ct. 1712). The State must then come forward with race neutral bases for the peremptory strikes. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. "The trial court then has the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712.

¶ 224. *Batson*, however, is not without flaws. Thus, in *Miller-El*, the United States Supreme Court refocused on all of the relevant circumstances of the case, rather than just the proffered race-neutral bases provided by the State:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain* 's wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

*Miller-El*, 545 U.S. at 239–40, 125 S.Ct. 2317 (citing *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712).

¶ 225. Thus, in finding that a *Batson* violation occurred in today's case, I consider all of the relevant circumstances in Flowers's case.

### A. History of Flowers's Case

¶ 226. In *Flowers III*, 947 So.2d at 935, this Court found as "strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." In *Flowers III*, the State exercised all twelve of its peremptory strikes on African Americans and all three of its strikes of alternate jurors on African Americans. After reviewing the individual strikes in the case, this Court found that the State engaged in purposeful discrimination during jury selection. *Id.* at 939. Thus, the Court reversed and remanded for a new trial on this basis. *Id.* The same prosecutor who this Court found had engaged in purposeful discrimination in *Flowers III* prosecuted the trial before this Court on appeal today. On its own, this fact is not dispositive of a finding of racial discrimination. This history, however, cannot be ignored and is part of the relevant circumstances that must be considered in this case.

¶ 227. In *Miller-El*, 545 U.S. at 253, 125 S.Ct. 2317, the United States Supreme Court considered the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time [the defendant's] jury was selected." If the history of discrimination by a district attorney's office is a permissible

consideration under *Batson*, surely the history of the *same prosecutor in the retrial of the same case* is a legitimate consideration. To fail to consider this history is to rebuff *Batson*'s direction that "all relevant circumstances" must be considered. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller-El*, 545 U.S. at 239–40, 125 S.Ct. 2317.

### B. Disparate Treatment—The Numbers

¶ 228. Like the history of today's case, a review of the statistics relating to the prosecutor's use of peremptory strikes is not, standing alone, dispositive of the *Batson* inquiry. These numbers, however, reveal a clear pattern of disparate treatment between white and African-American venire members. In today's case, a special venire of 600 citizens was drawn. The original venire consisted of forty-two percent African Americans. After the jury qualification and initial for-cause challenges, the venire consisted of twenty-eight percent African Americans. Ultimately, one African American served as a juror and one African American served as an alternate juror. Despite the initial venire consisting of forty-two percent African Americans, the jury that convicted and sentenced Flowers consisted of eight percent African Americans.

¶ 229. An analysis of the number and type of questions asked by the prosecutor further reveals a pattern of disparate treatment. During individual voir dire, the prosecutor asked white jurors an average of approximately three questions. African-American

jurors, however, were asked approximately ten questions each by the prosecutor.

¶ 230. Further, in what appears to be mere lip service to the voir dire process, when questioning most white jurors during individual voir dire, the prosecutor essentially repeated questions that the trial court had just asked. The trial court asked each juror standard death-penalty-qualification questions. The prosecutor would then—in substance—ask the same questions and then hand the juror off to be questioned by the defense. The prosecutor asked only nine percent of white jurors something beyond these duplicated questions.

¶ 231. In a stark contrast, the prosecution asked sixty-three percent of African Americans questions outside the standard death-penalty-qualification questions. As an example, fifty-five percent of African-American jurors who had some kind of connection to the Flowers family (through work, the community, or family) were asked questions by the prosecutor about this connection. Although five white jurors had similar connections to the Flowers family (through work and the community), the prosecutor failed to ask any questions about these connections.

¶ 232. As noted in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), statistical analysis can raise a question as to whether race influenced the jury selection process. The numbers described above are too disparate to be explained away or categorized as mere happenstance.

### C. Individual Jurors

¶ 233. The pattern of disparate treatment is further revealed when comparing the treatment of individual jurors. *See Flowers III*, 947 So.2d at 921 (citing *Manning*, 765 So.2d at 519) (A side-by-side comparison of jurors is helpful to determine whether purposeful discrimination existed.). Explanations by the prosecution are difficult to credit where the State accepted white jurors with the same traits it used to strike black jurors. *Foster*, 136 S.Ct. at 1750.

#### 1. Carolyn Wright

¶ 234. The State exercised one of its peremptory strikes on Carolyn Wright for the following reasons: (1) she knew several of the defense witnesses; (2) she was sued by Tardy's for an overdue account; and (3) she used to work with Flowers's father, Archie Flowers, Sr. During the *Batson* hearing, Flowers rebutted the State's bases for its peremptory strike first by noting that Pamela Chesteen, Harold Waller, and Bobby Lester all had a significant number of acquaintances involved in the case. Flowers responded to the fact that Tardy's had sued Wright by noting that the State had not questioned white jurors regarding their accounts at Tardy's. Finally, Flowers rebutted the basis relating to Wright's working relationship with Flowers's family by comparing Wright to Chesteen, who was a bank teller at a bank where the members of the Flowers family were customers.

¶ 235. Finding that the State's reasons for striking Wright were race-neutral, the trial court specifically noted that all jurors were asked by the court during group voir dire if they had accounts with Tardy's and whether they had been sued by Tardy's. The court found that this basis was race neutral because none of the white venire members reported that they had been sued by Tardy's. The trial court found that Wright's working relationship with Archie Flowers was distinguishable from the professional relationship Chesteen had with the Flowers family. Specifically, the court stated that the Winona Walmart was a "relatively small" Walmart and seemed to imply that Wright had a close relationship with Archie Flowers because of the small size of the store. The trial court also stated that no white jurors had reported working at Walmart with Archie Flowers. The trial court summed up its finding by stating:

> If the only reason the State offered was that she knows some of these defense witnesses, then there might be something there. But the fact is knowing these defense witnesses that you're intending to call, plus the fact that Tardy's had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her.

Each of the State's reasons for the peremptory strike is analyzed below.

*Wright's Relationships with Persons Involved in the Case*

¶ 236. In sum, Carolyn Wright had some type of connection to thirty-four people involved in Flowers's case. Flowers compares Wright to Chesteen, who knew thirty-one people involved in Flowers's case; Waller, who knew eighteen people involved in the case; and Lester, who knew twenty-seven people involved in the case.

¶ 237. Similar to Wright, Chesteen, Waller, and Lester all had a significant number of relationships with witnesses and persons involved with the case. One indicium of pretext this Court considers is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Flowers III*, 947 So.2d at 917 (quoting *Manning*, 765 So.2d at 519). Indeed, "'[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination.'" *Foster*, 136 S.Ct. at 1754 (quoting *Miller-El*, 545 U.S. at 241, 125 S.Ct. 2317). As such, this basis is suspect.

¶ 238. Flowers also claims that the State mischaracterized Wright's relationships with Flowers's family. Specifically, Flowers points out that the State claimed that Wright knew Flowers's sister, Sherita Baskin. Wright, however, never indicated that she knew Baskin. The State does not address this in its brief. This one statement could have simply been a slip

of the tongue. However, "lack of support in the record for the reason given for a peremptory strike has been identified as an indicator of pretext." *Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519). *Foster* emphasized this notion, noting that the prosecutor's "misrepresentations of the record" constituted evidence that a strike was motivated in substantial part by discriminatory intent. *Foster*, 136 S.Ct. at 1754.

*Wright's Litigation with Tardy's*

¶ 239. Flowers claims that the State mischaracterized Wright's litigation with Tardy's by claiming that her wages had been garnished as a result of the litigation. Nothing in the record supports the contention that Wright's wages were garnished. The only statements Wright made regarding the actual litigation were that she was sued, but that "it was paid off." Wright also stated that her involvement with the litigation would not affect her if she were selected as a juror. During the *Batson* hearing, the State produced a copy of the judgment in Wright's case, and Flowers's counsel asked if a garnishment order was attached. The trial court did not directly respond to this question, but instead stated that "it's an abstract of justice court where she was sued." Because there is no evidence that Wright's wages were garnished, the State did mischaracterize its basis for the peremptory strike. Further, unlike the misstatement discussed above relating to Wright's acquaintance with Sherita Baskin, the statement that Wright had her wages garnished seems to go directly to reasoning for the State's

strike—that Wright would have some sort of ill will toward Tardy's as a result of her wages being garnished. It is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages. As such, the State's unsupported characterization of the lawsuit is problematic. *See Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519); *Foster*, 136 S.Ct. at 1754.

*Wright's Working Relationship with Archie Flowers, Sr.*

¶ 240. Wright worked with Flowers's father, Archie Flowers, Sr., at Walmart; and on its face, this basis seems to be race-neutral. *See Manning*, 735 So.2d at 340 (This Court "has condoned a peremptory challenge against a juror who was acquainted with the defendant's family."). However, a review of the record reveals that this basis may have been pretextual. Although the State cited Wright's working relationship with Archie Flowers as a basis for its strike, the State made no effort during voir dire to question Wright about the working relationship beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group voir dire that she was unaware of whether Archie Flowers still worked at Walmart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of

questioning related to this basis is suspect. *See Miller-El*, 125 S.Ct. at 2328 (failing to conduct meaningful voir dire on subject with which State is allegedly concerned suggests that "explanation is a sham and a pretext for discrimination").

¶ 241. The questionable nature of the State's reason is compounded by its failure to strike Pamela Chesteen. Chesteen worked at a local bank in Winona and stated that she knew Archie Flowers, Sr., Lola Flowers, and Flowers's sisters from her work at the bank. Although the coworker relationship and bank-employee/customer relationship are not exactly comparable, the concern relating to the influence such relationships would have on a juror are the same—a concern that the coworker or employee would be influenced toward a family member of another coworker or a customer. The disparate treatment of Wright and Chesteen, along with the failure to conduct meaningful voir dire regarding Wright's working relationship with Archie, Sr., suggests this basis for the State's peremptory strike was pretext. *See Flowers III*, 947 So.2d at 924 ("Failure to voir dire as to the characteristic cited for the strike is also an indicator of pretext.").

¶ 242. When the State's bases and the record in today's case are viewed *in toto*, evidence of disparate treatment and pretext exists. *See id.* at 937 ("Though a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge only upon members of a particular race.").

### 2. Dianne Copper

¶ 243. The State provided the following reasons for striking Dianne Copper: (1) she worked with Archie Flowers and Cora Flowers, Flowers's sister; (2) she knew several members of the Flowers family; (3) she stated that she "leaned towards" Flowers's side of the case; and (4) she knew several defense witnesses. For the most part, the State focused on Copper's statement that she would lean toward Flowers as a result of her relationships with the Flowers family.

¶ 244. Flowers rebutted the State's reasons by again noting that several white jurors with multiple connections to persons involved in the case had not been challenged by the State. Flowers also argued that the State did not attempt to rehabilitate Copper when she stated that she would lean toward Flowers's side of the case. The trial court accepted the State's reasons as race neutral, finding that Copper's relationships with persons connected to the case were distinguishable from those of the white jurors not challenged by the State. The trial court also found that Copper was distinguishable from other jurors because she stated that she would tend to favor Flowers's side of the case and had worked with Flowers's father and sister.

*Copper's Relationships with Persons Connected to the Case*

¶ 245. Similar to his argument relating to Carolyn Wright, Flowers claims that the State's strike of Copper was pretextual because white jurors who knew

several defense witnesses were not struck. Further, Flowers claims that the State mischaracterized Copper's statements relating to whether she "leaned towards" Flowers in the case as a result of her relationship with the Flowers's family.

¶ 246. Copper knew thirty-one people involved in the case. Copper also testified about her relationship with the Flowers family and witnesses during voir dire:

> Q. Now, I noticed that you told us the other day that you lived on Harper Street at one time?
>
> A. Yes, sir.
>
> Q. That y'all [Copper and the Flowers family] lived on the same street.
>
> A. Not on the same street. Because they—they live on Cade Street, and I lived on Harper Street.
>
> Q. Don't they live on the corner of Cade and Harper?
>
> A. Well, I guess. I'm not—I—you know, my street is Harper and then its—as it go around—that's where I assume it was Cade Street. I'm not positive.
>
> Q. Okay. And you've stated that you worked with the defendant's sister at Shoe World?
>
> A. That's correct.

Q. And which sister was that?

A. Cora.

Q. How long did y'all work together?

A. Probably a year or two.

Q. Okay. You worked with the defendant's father?

A. Yes, sir.

Q. How long did you work with him?

A. Estimating, probably—possibly about the same, one to two years.

Q. Okay. And I want to make sure my notes are right, because we can all write down things wrong. You stated that you knew his father Archie Flowers.

A. Yes, sir.

Q. You know his brother, Archie, Jr.?

A. Yes, sir. I know his brother.

Q. You know his mother Lola?

A. Yes, sir, I do.

Q. You know witnesses in this case, Hazel Jones?

A. Yes, sir, I know her.

Q. You know Kittery Jones, a witness in this case?

A. Yes, sir, I know him.

Q. And you know Danny Joe Lott, a witness in this case?

A. Yes, sir.

Q. And I think it was yesterday and my notes show that you said that the fact that you know all of these people could affect you and you think it could make you lean toward him because of your connection to all of these people. Is that correct?

A. It—it's possible.

Q. Okay. That would be something that would be entering into your mind if you were on the jury, wouldn't it?

A. Yes, sir.

Q. And it would make it to where you couldn't come in here and, just with an open mind, decide the case, would it?

A. Correct.

¶ 247. Flowers's counsel attempted to rehabilitate Copper:

Q. . . . What I'm trying to find out is just as you could put aside all the information you heard before about this case, could you not also put aside the fact—if you got picked as a juror, put aside the fact that you have met Mr. Flowers, that you know some other people in these cases and be fair to the Tardys, the Stewarts, the Goldens, and Rigbys, and make whatever decision or vote that you're going to make

based on the evidence and the evidence only. Could you do that?

A. I feel like I could. But, you know, it—

Q. Is what you're saying—

A. Of course, it would make me, you know, feel uncomfortable. But if I had to do it, you know, I got to do what I got to do.

Q. Okay. So you're saying that—thank you. You're saying that you'll be uncomfortable. You'd prefer not to—I get the impression you're saying that you'd rather not be a juror. But if you got picked to be one, you would take the responsibility seriously, and you would follow the law and the rules that the Court give[s] you, and you would put aside anything that you are required to put aside and make your evidence and make your vote based on just the evidence you hear in the courtroom. Is that fair to say?

A. Yes, sir. That's correct.

¶ 248. As mentioned above, one indicium of pretext is "the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge." *Id.* at 917 (quoting *Manning*, 765 So.2d at 519). As such, the State's basis that Copper knew several witnesses in the case is suspect. While the other bases the State provided appear to be race neutral—namely, Copper's relationship with Flowers's family and the possibility that it could cause

her to "lean toward" Flowers, the unchallenged jurors with a shared characteristic must still be considered.

### 3. Flancie Jones

¶ 249. The State provided the following reasons for striking Jones: (1) she is related to Flowers; (2) she was late for jury selection on two separate occasions; and (3) she provided inconsistent statements on her view of the death penalty by lying on her juror questionnaire in an attempt to avoid serving as a juror. After reviewing the record, the State's bases for striking Jones appear to be race-neutral.

### 4. Tashia Cunningham

¶ 250. The State cited Cunningham's working relationship with Flowers's sister and her wavering statements on the death penalty as bases for its peremptory strike. During the *Batson* hearing, Flowers's counsel rebutted the State's reasons by pointing out that Cunningham stated that she could set aside her relationship with Flowers's sister and be a neutral juror. Defense counsel also compared Cunningham to Chesteen, the juror who knew several of Flowers's family members from working at a local bank. Finally, Flowers's counsel compared Cunningham's alleged wavering views on the death penalty to views of white jurors. The trial court found that both of the State's reasons were race-neutral:

> And Ms. Cunningham's all-over-the-map response to the death penalty, plus her situation

about working so closely with Mr. Flowers's sister, in my mind, the State has shown race-neutral reasons for that strike.

*Cunningham's Working Relationship with Flowers's Sister*

¶ 251. During voir dire, Cunningham stated that she and Sherita Baskin, Flowers's sister, did not have a close relationship; Cunningham described it as a "working relationship." According to Cunningham, she and Baskin would "sometime" see each other, but would not see each other at work every day. Cunningham also stated that she worked at the end of the assembly line, and Baskin worked at the front of the line. The two women worked the same shift for two or three years.

¶ 252. Apparently, the State called Cunningham's employer, ADP, to confirm her testimony relating to her working relationship with Baskin. During individual voir dire, the State asked Cunningham further questions about the relationship:

Q: And you work with the Defendant's sister, Sherita Baskin?

A: Yes.

Q: Now, the other day, I think you said that you do not work close to her?

A: No, I do not.

Q: Would you think about that for a minute?

A: I do not.

Q: Are you sure that you do not work side by side with her?

A: No, I do not.

Q: And you're saying that under oath?

A: Yes, sir.

¶ 253. In response to Cunningham's statements, the State called an ADP quality control clerk, Crystal Carpenter, to give testimony. Carpenter testified that Cunningham and Baskin both worked on the "raw 2 line" and that the women worked side-by-side—"nine or ten inches" apart from one another. Twenty-five to thirty-five persons worked on this particular assembly line. Carpenter also testified that the women would occasionally not work side-by-side if another employee was absent from work and a spot in another location needed to be filled, but that the women typically worked next to one another. Carpenter observed the women working every day and based her testimony on her personal observations. Flowers's counsel asked Carpenter if there was documentation supporting the location of Cunningham and Basking on the assembly line, and Carpenter stated that she could provide documentation supporting her testimony. Apparently, Carpenter did not provide the documentation.

¶ 254. At first glance, the conflicting testimony of Cunningham and Carpenter tends to provide a race-neutral basis for the State's challenge. *See Manning*, 735 So.2d at 340. When considering the voir dire

process as a whole, however, the State's investigation of Cunningham is suspect. As discussed above, the State accepted Pamela Chesteen as a juror even though she stated that several members of the Flowers family were customers at the bank where she worked. There is no evidence in the record that the State further investigated the relationship between Chesteen and the Flowers family, and the State did not voir dire Chesteen on this subject. The absence of voir dire and investigation for Chesteen compared to the thorough investigation for Cunningham is problematic and tends to evidence disparate treatment. *See Miller-El*, 125 S.Ct. at 2328 (failing to conduct meaningful voir dire on subject with which State is allegedly concerned suggests that "explanation is a sham and a pretext for discrimination"); *see also Flowers III*, 947 So.2d at 924 ("Failure to voir dire as to the characteristic cited for the strike is also an indicator of pretext.").

*Cunningham's Wavering Views on the Death Penalty*

¶ 255. The State cited Cunningham's wavering views on the death penalty as another basis for its challenge. On her juror questionnaire, although she stated that she had "no opinion" on the death penalty, Cunningham stated that she would not consider the death penalty under any circumstances. During voir dire by the trial court, Cunningham initially stated that she could not consider the death penalty as a punishment, but she then stated that she "might" consider it:

Q: . . . [w]hat's your view on even considering the death penalty?

A: I would not.

. . .

Q: Are—are you saying you would not consider it?

A: No, sir.

Q: Even if the law allowed it and the facts justified it, you just could not even consider it?

A: No, sir.

. . .

Q: So—but again, just tell me again what your feelings are on the death penalty.

A: I don't believe in the death penalty.

Q: And would there be a possible—could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's—in your own mind, you might could—are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a—you know, you haven't heard anything. And

all we want to know is whether you could consider that as a possibility—that as a sentencing possibility, because you and your fellow jurors will decide the sentence, but I just want to know if you could even consider that as a possible sentence?

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).[9]

Then during voir dire by the State, Cunningham returned to her initial position of not being able to consider the death penalty:

Q: All right. As far as the death penalty—and I want to make sure I understand what you're saying—if the law authorized the death penalty in this case and you found that the facts of the case that came from the stand justified it, could you, in fact, vote for the death penalty?

A: I don't think so.

. . .

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?

A: I don't think so.

Q: You don't think so.

---

[9] The record does not indicate whether Cunningham was nodding in the affirmative or the negative.

A: That I could.

When questioned by defense counsel, Cunningham then stated that she could consider both punishments:

Q: . . . And what you're required to do is just consider both, then decide which way you want to vote. Do you understand now?

A: Yes, sir.

Q: And that's your decision. And with that being the case, can you consider both options, then vote your conscience?

A: Yes.

¶ 256. This Court has recognized that a juror's views on the death penalty may provide a race-neutral basis for a peremptory challenge. *See Batiste v. State*, 121 So.3d 808, 848 (Miss. 2013); *Flowers III*, 947 So.2d at 920–21. In *Flowers III*, this Court found that the striking of an African American who had "virtually indistinguishable" views on the death penalty as compared to white jurors who were not struck raised an inference of discrimination, although, standing alone, it did not warrant the finding of a *Batson* violation. *Flowers III*, 947 So.2d at 921. In today's case, there are no white jurors who survived for-cause challenges whose views on the death penalty were comparable to Cunningham's. As such, it cannot be said that this basis was pretext.

¶ 257. This race-neutral basis, however, does not erase the prosecutor's highly suspect investigation of

Cunningham's working relationship with Flowers's sister. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller-El*, 545 U.S. at 239–40, 125 S.Ct. 2317. No evidence in the record provides a basis for the in-depth investigation. Likewise, nothing in the record evidences that a similar investigation was performed for all other jurors. With this suspect record, the prosecution's unusual investigation of Cunningham must be seen for what it is worth—a questionable search for a race neutral basis, indicating that striking Cunningham was "motivated in substantial part by discriminatory intent." *See Foster*, 136 S.Ct. at 1754 (internal quotations omitted).

### 5. Edith Burnside

¶ 258. The State provided the following reasons in support of its peremptory strike of Burnside: (1) she knew Flowers and members of his family; (2) she was sued by Tardy's Furniture; and (3) she provided inconsistent statements regarding her views on the death penalty.

#### *Burnside's Litigation with Tardy's*

¶ 259. During voir dire, the trial court asked the entire venire if anyone had been sued by Tardy's, and Burnside responded that she had been sued by the store. Later, Burnside explained that she was able to pay off the amount that she owed the store and that the litigation stemmed from a misunderstanding about her account after the murders occurred. During the

*Batson* hearing, the State represented that Burnside had a garnishment issued against her. The prosecutor stated: "She also was sued by Tardy Furniture, and a garnishment was issued against her. She tried to deny that and said that she just settled with them when she came back but she was, in fact, sued by them." The State's description of the litigation and Burnside's testimony regarding the same is not completely supported by the record. In response to the trial court's first inquiry during group voir dire, Burnside stated: "I had an account there, but I was not sued by Ms. Bertha. It was later on when it was took over by Mr. Frank and Roxanne." Burnside then confirmed that she was sued by Tardy's.

¶ 260. Then, during individual voir dire, Burnside further explained the suit:

> A: . . . . Let me explain that. I worked for Ms. Bertha. She hired me to work for Mr. Tardy before she was married to him the first time. I was caring for Ms. Lena Tardy. That's how I met Ms. Bertha. So when me and my husband was going through a divorce, she let me have some furniture. And she said she was going to note it on the book. Sometimes, I cleaned up for her and I paid for it and we just have, like, a little understanding about it. Okay. When she got killed, it was still on the book. And then her son-in-law—when I came back from Nevada, then that's when I had to pay for it. I don't remember when it was.

Q: So there was a dispute between you and her son-in-law?

A: No. It wasn't a dispute. He just—

Q: Well, did you agree that you owed it?

A: Yes. We had no falling out about it. I had the funds, and I agreed I owed it. When I went to Nevada, I guess it was just a space where I owed him. When I came back here and went to work, I paid him for it. We never had a misunderstanding about it.

Q: If it wasn't no misunderstanding, why did it have to go to court?

A: I'm not quite sure about that. I remember them bringing the papers after I come back here to go to work. Maybe he found out I was back or what. But then I went down to the store—that's when they had moved the store over to where the other building was—and I talked to him about when I paid it. We never had a falling out about it.

Q: But you did have to be sued over it?

A: Yes. I can't remember the—

Q: And there was a judgment against you?

A: Yes. But it was no falling-out about it.

Q: Is there anything about that, that would cause you any difficulty in that case?

A: No. Because he is a distributor for something for one of our salesman at Super Value where I work, and he come in every Thursday, and the lady make an order so I see him like on a weekly basis. But, you know, sometimes, I speak if it's—because she see him like over in her office, so no, it's nothing about that would make me have no—.

¶ 261. Similar to the State's characterization of Wright's litigation with Tardy's discussed above, the State's representation that Burnside's wages were garnished and that Burnside "denied" this is unsupported by the record in today's case. This incorrect description of the litigation between Burnside and Tardy's is suspect. *See Flowers III*, 947 So.2d at 924 (citing *Manning*, 765 So.2d at 519) ("Lack of support in the record for the reason given for a peremptory strike has been identified as an indicator of pretext."); *Foster*, 136 S.Ct. at 1754 (misrepresentations of the record are evidence of discriminatory intent).

*Burnside's Relationships with Flowers and His Family*

¶ 262. The State also cited Burnside's relationships with Flowers and his family as a basis for its challenge. Burnside stated during voir dire that she used to live close to the Flowers family. Flowers and his sister, Prisilla, used to visit Burnside's home. Further, Flowers was friends with Burnside's sons and used to play football with them. Burnside stated that

these relationships would not affect her ability to serve as a juror.

¶ 263. No white venire members had comparable—or even close to comparable—relationships with Flowers and his family. This Court has recognized that a juror's relationships with the defendant's family may provide a race-neutral reason for a peremptory challenge. *See Manning*, 735 So.2d at 340. And although Burnside stated that her connections to the Flowers family would not affect her when serving as a juror, this basis—standing alone—seems to not be pretext. As mentioned above, however, this race neutral basis does not negate the questionable characterization of Burnside's litigation with Tardy's. *Batson*, 476 U.S. at 96–97, 106 S.Ct. 1712; *Miller-El*, 545 U.S. at 239–40, 125 S.Ct. 2317.

*Burnside's Statements Regarding the Death Penalty and Her Ability to Judge Others*

¶ 264. The State's final reasons for striking Burnside were her statements relating to whether she could judge another person and impose the death penalty. Burnside testified as follows during individual voir dire:

> Q: . . . . And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A: That I don't think I could do. I don't know if I could do that. . . . I don't—I don't know

if I could consider it, sending anybody to death. I don't know if I could do that.

Q: And can you explain further your views on that?

A: I've just never been put in that predicament. I've always just don't know if I could do that. It's just the best way I can explain it. I just don't think I could do that.

Q: Again, let me explain. You're not committing to do it or not to do it. You're just—we just need to know if that's something that would be in your mind where you could think about it and you could consider the possibility of it.

A: I could think about it and consider it. That's all I could say.

Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?

A: If I was on there, yeah, I guess I'd have to.

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Q: Also, if he did not receive that death sentence—if he was convicted and the jury did not impose the death sentence, . . . [he] would receive the sentence of life without parole. So is that a sentencing option that you could consider, also?

A: Yes, I could consider that.

Q: And so you would consider and have an open mind as to both sentencing options then; is that correct?

A: Yes, sir.

Although Burnside eventually stated that she would consider both sentencing options, she later stated in voir dire that her reservations about judging another person would affect her ability to serve as a juror:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But then when they come back and say could I be fair. My thing is I prefer not to judge anyone. But no, I will be fair.

Q: All right. Who will you be fair to?

A: I will be fair to whoever evidence is presented. I will be fair. Because I would want somebody to be fair to me or my children or my family. That the only way I can explain it.

. . .

Q: So you have changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in the case; is that right?

A: It could, possibly, yes, sir.

Flowers's counsel then rehabilitated Burnside:

Q: Ms. Burnside, if you got picked on the jury, you would be fair to both sides, wouldn't you?

A: Yes, sir.

Q: And despite the fact that you don't like to judge, if you got picked you would, in fact, judge and be fair to both sides; is that correct?

A: Yes, sir, that is correct.

¶ 265. While a juror's views on the death penalty and hesitation about serving as a juror are race neutral reasons for peremptory challenges, the State rehabilitated Burnside and she ultimately stated that she could consider either punishment and could be fair to either side. *See Batiste*, 121 So.3d at 848; *Hughes*, 90 So.3d at 626; *Flowers III*, 947 So.2d at 920–21. As such, this basis is somewhat suspect.

### D. Jury Selection Conclusion

¶ 266. While the Court has focused on the interests of Flowers in having a jury not tainted by racial bias, it has ignored the right of prospective jurors not to be subjected to racial bias. Beyond question, the right to a jury selection process free from the taint of racial discrimination belongs both to the parties and to the prospective jurors. *See Powers v. Ohio*, 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (Courts are "under an affirmative duty to enforce the . . . policies embodied in [the] prohibition" on the discrimination in the selection of jurors.). When the trial court and this Court, in robotic fashion, merely say that the prosecution gave facially race-neutral reasons, which were not rebutted by the defense, both completely disregard the constitutional right of prospective jurors to be free from a racially discriminatory selection process.

¶ 267. No attorneys are present in the courtroom to protect the constitutional rights of perspective jurors. Thus, of necessity, that responsibility must be undertaken by the trial courts. The honest exercise of

that responsibility demands that the trial court look beyond the mere recitation of the words "race neutral." In this case, the trial court completely ignored and failed in that responsibility.

## III. *Batson* Conclusion

¶ 268. As noted previously, this case has been twice reversed by this Court for some of the same issues presented to the Court today. In the retrial of a case under these circumstances, where the same issues are confronted, the trial court is obligated to look beyond the surface. The United States Supreme Court's decision in *Foster* affirms this principle. The trial court failed in that obligation.

¶ 269. Because of that failure, I cannot conclude that Flowers received a fair trial, nor can I conclude that prospective jurors were not subjected to impermissible discrimination. For these reasons, I would reverse and remand for a new trial.

## IV. Additional Errors

¶ 270. While the United State [sic] Supreme Court focused its remand on the *Batson* violation, and while I find the *Batson* violation dispositive, I continue to believe that other errors occurred at trial that also warrant reversal. Those errors were memorialized in Presiding Justice Dickinson's dissent in the original appeal on this matter. *Flowers v. State*, 158 So.3d 1009, 1076–83 (Miss. 2014) (Dickinson, P.J., dissenting). The

circuit judge erred by refusing to allow the accused to defend the charges by calling a qualified expert to provide perfectly admissible expert opinions, and by instructing the jury on an aggravating factor for which the State provided no evidence. I reiterate those errors here, with credit to then-Justice Dickinson. *See id.* (Dickinson, P.J., dissenting).

### A. Dr. Neuschatz should have been allowed to testify.

¶ 271. The trial judge categorically prohibited Flowers's expert, Dr. Jeffrey Neuschatz, from providing expert testimony on eyewitness identification. It was not that the trial judge disagreed with the evidence in Dr. Neuschatz's expert affidavit—he ignored it. The trial judge felt that any helpful information that could have been provided by the expert could just as easily have been developed through cross-examination. But the information the expert would have provided could never be developed on cross examination, because the witnesses would not know they had made misidentifications.

¶ 272. This Court reviews a trial court's ruling on the admissibility of evidence under a deferential abuse of discretion standard. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003) (internal citations omitted). Under Rule 702, an expert's testimony must satisfy a two-part test. *Id.* at 35. "First, the witness must be qualified by virtue of his or her knowledge, skill, experience[,] or education. Second,

the witness's scientific, technical[,] or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue." *Id.*

¶ 273. The trial judge is to act as a gatekeeper and may look to "a non-exhaustive, illustrative list of reliability factors for determining the admissibility of expert witness testimony." *Id.* at 36 (internal citations omitted). The five factors referenced in *Daubert*[10] look at whether: (1) the theory or technique can be and has been tested; (2) the theory has been subjected to peer review and publication; (3) there is a high known or potential rate of error; (4) there are standards controlling the technique's operation; and (5) the theory or technique enjoys general acceptance within a relevant scientific community. *Id.* (internal citations omitted). The presence or absence of any one of these factors is not dispositive.

¶ 274. The issue of allowing experts to testify about the reliability of eyewitness identification is not new. A majority of state jurisdictions allow eyewitness identification experts to testify, provided they are properly qualified and their opinions satisfy reliability concerns, such as those set forth in *Daubert*. For instance, the Tennessee Supreme Court—evaluating factors similar to those mentioned in *Daubert*—reversed its prior position seven years ago and now allows properly qualified eyewitness experts to testify, finding that such testimony can be helpful in the jury's

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[10] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

evaluation of an eyewitness's identification. *State v. Copeland*, 226 S.W.3d 287, 302–304 (Tenn. 2007). And the vast majority of states and the District of Columbia either give trial courts discretion to allow eyewitness identification expert testimony, or require the admission of such testimony.[11]

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[11] *See Ex Parte Williams*, 594 So.2d 1225, 1227 (Ala. 1992) ("It is clear from these cases that there is presently a trend in the law to allow expert testimony on the subject of human memory."); *Skamarocius v. State*, 731 P.2d 63, 66–67 (Alaska 1987); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208, 1219 (1983), *overruled on different grounds by State v. Benson*, 232 Ariz. 452, 307 P.3d 19 (2013); *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242, 244–45 (1993); *People v. Jones*, 30 Cal.4th 1084, 135 Cal.Rptr.2d 370, 70 P.3d 359, 388 (2003) ("Exclusion of the expert testimony is justified only if there is other evidence that substantially corroborates the eyewitnesses identification and gives it independent reliability."); *People v. Campbell*, 847 P.2d 228, 233 (Colo. App. 1992); *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705, 731–32 (2012); *Hager v. U.S.*, 856 A.2d 1143, 1147 (D.C. 2004); *McMullen v. State*, 714 So.2d 368, 371 (Fla. 1998); *Johnson v. State*, 272 Ga. 254, 526 S.E.2d 549, 552 (2000); *People v. Enis*, 139 Ill.2d 264, 151 Ill.Dec. 493, 564 N.E.2d 1155, 1165 (1990); *Cook v. State*, 734 N.E.2d 563, 570 (Ind. 2000); *State v. Schutz*, 579 N.W.2d 317, 319 (Iowa 1998) ("[T]he admissibility of expert testimony relating to the accuracy of eye witness identification rests within the sound discretion of the trial court."); *State v. Carr*, 300 Kan. 1, 331 P.3d 544, 690 (2014), *overruled on other grounds by Kansas v. Carr*, ___ U.S. ___, 136 S.Ct. 633, 193 L.Ed.2d 535 (2016); *Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002) (noting that the vast majority of jurisdictions have left the admission of eyewitness expert identification testimony to the discretion of trial courts); *State v. Rich*, 549 A.2d 742, 743 (Me. 1988); *Bomas v. State*, 412 Md. 392, 987 A.2d 98, 114–115 (2010); *Commonwealth v. Santoli*, 424 Mass. 837, 680 N.E.2d 1116, 1120 (1997); *State v. Barlow*, 541 N.W.2d 309, 313 (Minn. 1995); *State v. DuBray*, 317 Mont. 377, 77 P.3d 247, 255 (2003) ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when

¶ 275. In this case, the trial judge first found that the trier of fact did not need Dr. Neuschatz's testimony. He stated: "Given the extensive cross-examination of Mr. Collins and because all other witnesses knew Mr. Flowers on sight, I do not believe an expert on witnesses identification would assist the jury in the least bit in this case." This conclusion was demonstrably incorrect. The trial judge provided no analysis of how cross-examination of the witnesses could develop the opinions provided by Dr. Neuschatz, or how the witnesses themselves could provide expert testimony. The eyewitnesses certainly could provide the facts, such as distance, lighting, length of time, etc. But Dr. Neuschatz was not presented to testify to the facts

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no substantial corroborating evidence exists."); *White v. State*, 112 Nev. 1261, 926 P.2d 291, 292 (1996); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 916–17 (2011); *People v. LeGrand*, 8 N.Y.3d 449, 835 N.Y.S.2d 523, 867 N.E.2d 374, 379 (2007); *State v. Fontaine*, 382 N.W.2d 374, 378 (N.D. 1986); *State v. Buell*, 22 Ohio St.3d 124, 489 N.E.2d 795, 803 (1986); *Bristol v. State*, 764 P.2d 887, 890 (Okla. Crim. App. 1988); *State v. Lawson*, 352 Or. 724, 291 P.3d 673, 697 (2012); *Commonwealth v. Walker*, 625 Pa. 450, 92 A.3d 766, 791 (2014) ("[I]n light of the magnitude of scientific understanding of eyewitness identification and marked developments in case law during the last 30 years, it is no longer advisable to ban the use of expert testimony to aid a jury in understanding eyewitness identification."); *State v. Sabetta*, 680 A.2d 927, 933 (R.I. 1996); *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369, 372 (1991); *State v. Hill*, 463 N.W.2d 674, 676 (S.D. 1990); *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996); *State v. Clopten*, 223 P.3d 1103, 1112 (Utah 2009); *State v. Percy*, 156 Vt. 468, 595 A.2d 248, 253 (1990); *State v. Cheatam*, 150 Wash.2d 626, 81 P.3d 830, 842 (2003); *State v. Utter*, No. 13-0479, 2014 WL 1673025, at *3 (W. Va. Apr. 25, 2014); *State v. Shomberg*, 288 Wis.2d 1, 709 N.W.2d 370, 377 (2006); *Engberg v. Meyer*, 820 P.2d 70, 79–80 (Wyo. 1991).

alone. His role was to begin with the facts provided by the eyewitnesses, and then provide expert testimony as to the difficulties and reliability associated with identification. The eyewitnesses themselves certainly could not provide the testimony expected from Dr. Neuschatz.

¶ 276. Nor could cross-examination provide an adequate substitute for Dr. Neuschatz's testimony. A skillful attorney may utilize cross-examination to expose contradictions in a witness's testimony. But no attorney—of even the greatest skill—can cross-examine a witness in such a way as to expose that the witness did not see what the witness actually believes he saw. And that is exactly the purpose of expert eyewitness identification testimony. Dr. Neuschatz—if allowed to testify—would have explained scientific principles affecting the accuracy of a witness's perception of what he saw.

¶ 277. The trial judge's entire *Daubert* analysis was as follows:

> Further, though, I think aside from the fact that I do not think this would assist the trier of fact, I do not think all the *Daubert* principles have been shown to the Court to apply to this testimony. The defense has not offered to this Court this idea that the theories the defense would testify to or the area of expertise proffered are generally accepted. I do not know whether the testimony has a potential or known high rate of error. I do not have anything about that. I do not know anything

> about the principles and methods used to come to conclusions. And basically, the witness did not apply the principles and methods to the facts of this case. He made broad generalizations in the document that was submitted, but he did not specifically apply those principles and methods to the facts of this case. So for all these reasons, I do not think that this witness testimony would be appropriate, and I am going to deny the testimony of this witness.

The following is a detailed analysis of each sentence of the trial judge's *Daubert* analysis, and it demonstrates that the trial judge abused his discretion in refusing to allow Dr. Neuschatz to testify as an expert.

*"I do not think all the* ***Daubert*** *principles have been shown to the Court to apply to this testimony."*

¶ 278. This statement suggests the trial court erroneously believed the defendant had a burden to show that "all the *Daubert* factors" applied. Clearly, this is not the case.

*"The defense has not offered to this Court this idea that the theories the defense would testify to or the area of expertise proffered are generally accepted."*

¶ 279. This conclusion was incorrect. Dr. Neuschatz cited thirty-three studies in his affidavit, each of which indicated general acceptance in the field of psychology.

The State offered no evidence in rebuttal of Dr. Neuschatz's affidavit on this point.[12]

¶ 280. The majority's only reason for agreeing with the trial judge on this point is that Dr. Neuschatz did not attach each article to his affidavit. But under our Rules of Evidence, experts are not required to attach the basis of their opinions to their affidavits. Instead, they are allowed to rely on studies that they do not provide to the court, unless requested by the court. Rule 705 provides

> The expert may testify in terms of opinion or inferences and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Miss. R. Evid. 705.

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[12] Dr. Neuschatz cited studies by: (1) Neisser 1967; (2) Loftus 1979; (3) Loftus & Loftus 1990; (4) Schacter 1995; (5) Ellis, Davis & Shepard 1977; (6) Maclin, Maclin & Malpass 2001; (7) Shapiro & Penrod 1986; (8) Memon, Hope & Bull 2003; (9) Culter & Penrod 1988; (10) Culter, Penrod & Martens 1987 (study a); (11) Culter, Penrod & Martens 1987 (study b); (12) Culter 1986; (13) O'Rourke 1987; (14) Culter 2006; (15) Tulving 1983; (16) Hunt & Ellis 1974; (17) Read, Tollestrup, Hammersley, McFadden & Christensen 1990; (18) Ross, Ceci, Dunning & Toglia 1994; (19) Meissner & Brigham 2001; (20) Gibson 1969; (21) Wells & Bradfield 1998; (22) Neuschatz 2005; (23) Hafstad, Memon & Logie 2004; (24) Wells, Small, Penrod, Malpass, Fulero & Brimacombe 1998; (25) Haw & Fisher 2004; (26) Gorrloch & Brimacombe 2001; (27) Neuschatz & Gutler (in progress); (28) Douglas, Smith, & Frasier-Hill 2005; (29) Malpass & Devine 1981; (30) Stebaly 1997; (31) Loftus 1993; (32) Johnson 1993; and (33) Pezdek 2007.

¶ 281. In this case, neither the trial judge nor the State requested production of the underlying data or the articles upon which Dr. Neuschatz relied. It was clear error for the trial judge to reject Dr. Neuschatz's affidavit merely because the articles were not attached. And the majority compounds the error by requiring the expert in this case to do something other experts are not required to do,[13] and something this very Court's rules specifically do not require.

¶ 282. In *Watts v. Radiator Specialty Company*, this Court considered whether an expert's opinions were actually supported by the case-studies he cited. *Watts v. Radiator Specialty Co.*, 990 So.2d 143, 146–48 (Miss. 2008). The expert in that case did not provide the studies to the court. *Id.* at 147 n.7. Though this Court found that the trial court properly excluded the expert's testimony because the studies did not support his conclusion, the Court never questioned his failure to provide those studies. *Id.*

*"I do not know whether the testimony has a potential or known high rate of error. I do not have anything about that."*

¶ 283. Again, on this point, the trial judge was incorrect. In his affidavit, Dr. Neuschatz discussed extensive testing that produced precise error rates. For

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[13] It is difficult to imagine the Majority rejecting out-of-hand the opinions of the State's pathologist as to the cause and manner of death, simply because the record does not include all of the underlying studies and data that contributed to that opinion.

instance, in discussing the factor of exposure time, Dr. Neuschatz stated:

> Exposure duration had a significant impact on identification accuracy. Ninety-five percent of the young adults and 85% of the older adults made correct identifications from the robber-present photo arrays when the robber was exposed for 45 seconds, but only 29% of the young adults and 35% of the older adults made correct identifications when the robber was exposed for 12 seconds.

¶ 284. In discussing the appearance change disguise factor, he stated: "The average performance levels across the six studies, which involved over 1,300 eyewitness identifications, was 57% correct when uncovered and versus 44% when a hat was worn."

¶ 285. In discussing cross-race identification, Dr. Neuschatz stated:

> The reliability of the ORB [own-race bias] was examined by Meissner and Brigham (2001) who meta-analyzed the results of 31 separate studies involving 91 separate experimental tests of own versus same-race identifications. The studies included over 5,000 participants. Across all studies, eyewitnesses were 1.4 times more likely to correctly identify members of their own race than members of other races, and they were 1.56 times more likely to falsely identify members of other races than members of their own race.

¶ 286. These and other studies cited in the affidavit speak not only to error rates but also to the reliability of Dr. Neuschatz's opinions.

*"I do not know anything about the principles and methods used to come to conclusions."*

¶ 287. Here again, the trial judge was incorrect. The studies cited above, and the balance of Dr. Neuschatz's affidavit are replete with descriptions of the methods and principles used in the numerous studies.

¶ 288. Dr. Neuschatz's affidavit contained detailed information about studies on: (1) how memory works; (2) effect of exposure time on reliability of memory; (3) effect of appearance changes and disguises on identification; (4) the phenomenon of unconscious transference where one situation is confused with another; (5) problems with cross-racial identifications; (6) problems with post identification feedback; and (7) problems with suggestive line-up procedures.

*"And basically, the witness did not apply the principles and methods to the facts of this case. He made broad generalizations in the document that was submitted, but he did not specifically apply those principles and methods to the facts of this case."*

¶ 289. Again, the trial judge was incorrect. Dr. Neuschatz indeed applied the principles and methods in his field of expertise to the facts in the Flowers case. For instance, he analyzed in detail the effect of the police's line-up identification. Also, he addressed issues

involving Porky Collins's identification, including problems with cross-racial identifications.

*Refusing to allow Dr. Neuschatz to testify was not harmless error.*

¶ 290. Dr. Neuschatz's testimony would have provided the jury a fair basis upon which to judge the accuracy of Collins's identification. I also cannot accept the majority's conclusion that "Collins's identification was far from the only evidence of guilt in the instant case, and it cannot be label [sic] 'critical.'"

¶ 291. It is true that the State had other witnesses, but none provided the powerful eyewitness testimony that Collins provided. He is the only witness who placed Flowers at the scene of the murders shortly before they were committed. None of the witnesses was more critical to the State's case, and none was more important for the defense to attack.

¶ 292. The State offered *nothing* in rebuttal of Dr. Neuschatz's opinions: no experts, articles, studies, or evidence of any kind that tended to refute his opinions and methodology. Accordingly, Dr. Neuschatz should have been allowed to testify in this case.

**B. The trial judge should have denied the State's requested instruction on the commission of a capital crime to avoid arrest aggravator.**

¶ 293. When Flowers's case proceeded to the sentencing phase, the trial judge instructed the jury to consider three potential aggravating factors:

1. The Defendant knowingly created a great risk of death to many persons.
2. The capital offense was committed while the Defendant was engaged in the commission of the crime of armed robbery for pecuniary gain.
3. The capital offense was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody.

The jury found each aggravating factor and sentenced Flowers to death. Because the trial judge erred when he instructed the jury to consider the third aggravating factor, I would reverse Flowers's death sentence and remand for resentencing even if this Court affirmed his conviction.

¶ 294. It is elementary that the State bears the burden to prove the defendant's guilt of a charged offense beyond a reasonable doubt. *Henley v. State*, 136 So.3d 413, 415–16 (Miss. 2014). Likewise, our law places upon the State the burden in a capital murder sentencing proceeding to prove the existence of **each aggravating factor beyond a reasonable doubt**. *Holland v. State*, 587 So.2d 848, 874 (Miss. 1991) (citing

*Nixon v. State*, 533 So.2d 1078, 1099 (Miss. 1987), *overruled on other grounds by Wharton v. State*, 734 So.2d 985, 991 (Miss. 1998)); *see also Keller v. State*, 138 So.3d 817, 867–68 (Miss. 2014). Only when the State satisfies its burden may the jury weigh a particular aggravating factor in favor of a death sentence. *Keller*, 138 So.3d at 867–68.

¶ 295. The Majority relies on this Court's repeated statement that an instruction should be granted on this aggravating factor if the jury may draw an inference from the evidence that avoiding arrest was "a substantial reason for the killing." *Id.* at 868 (quoting *Gillett v. State*, 56 So.3d 469, 505–06 (Miss. 2010) (quoting *Leatherwood v. State*, 435 So.2d 645, 651 (Miss. 1983))); *see also Wiley v. State*, 750 So.2d 1193, 1206 (Miss. 1999); *Woodward v. State*, 726 So.2d 524, 540 (Miss. 1997); *Foster v. State*, 687 So.2d 1124, 1140 (Miss. 1996); *Taylor v. State*, 672 So.2d 1246, 1275 (Miss. 1996); *Walker v. State*, 671 So.2d 581, 611 (Miss. 1995); *Carr v. State*, 655 So.2d 824, 853–54 (Miss. 1995); *Chase v. State*, 645 So.2d 829, 858 (Miss. 1994); *Hansen v. State*, 592 So.2d 114, 153 (Miss. 1991); *Lanier v. State*, 533 So.2d 473, 490 (Miss. 1988). But that standard—stated in that way with nothing more—cannot be the law. Saying jurors may draw an inference is not enough, unless the inference is so strong that, standing alone, the inference is sufficient for a finding beyond a reasonable doubt. The inference in this case clearly does not fall into that category.

¶ 296. The Majority says a reasonable juror could infer that Flowers killed one of the victims to

prevent identification and avoid arrest. While a reasonable juror might very well find that to be a possibility, it would be no more than a guess. And no reasonable juror could make that finding beyond a reasonable doubt. Judges should submit issues to juries through instructions *only* when a reasonable juror could find the beyond a reasonable doubt burden of proof satisfied on that issue. *Henley*, 136 So.3d at 415–16 (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss. 1985) (citing *May v. State*, 460 So.2d 778, 781 (Miss. 1984)) (a directed verdict should be granted if no reasonable juror could find the defendant guilty beyond a reasonable doubt)); *Harper v. State*, 478 So.2d 1017, 1021 (Miss. 1985) (a lesser offense instruction should be granted unless no reasonable juror could find that the defendant committed the lesser offense).

¶ 297. Stated another way, jurors certainly are free to draw reasonable inferences from the facts. But a juror's ability to draw a reasonable inference is not the same as a reasonable juror's ability to find that fact beyond a reasonable doubt. For instance, one may draw a reasonable inference that a person who usually goes to lunch from 12:00 to 1:00 p.m. is at lunch on a particular day at 12:30 p.m. But that does not mean one may reach that conclusion beyond a reasonable doubt.

¶ 298. So a trial judge should grant a State's request to instruct the jury on this aggravating factor only where the State has presented evidence from which a reasonable juror could find beyond a reasonable doubt that "a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover

their tracks' so as to avoid apprehension and eventual arrest by authorities." *Keller*, 138 So.3d at 867–68 (quoting *Gillett*, 56 So.3d at 505–06 (quoting *Leatherwood*, 435 So.2d at 651)). And any case that categorically establishes inferences as sufficient to satisfy the beyond-a-reasonable-doubt standard should be overruled.

¶ 299. The State presented insufficient evidence to meet its burden. The most that may be said in this case is that the jury could speculate that Flowers committed one of the murders to avoid arrest. There was no evidence that he did. In fact, the State argued in the guilt phase that Flowers committed the murders for different purposes: revenge and anger over being fired as well as to effectuate the robbery. From its opening statement, the State's theory of the case was that Flowers possessed a motive to commit the murders because he had been fired by Tardy's. This motive—a revenge killing—is at odds with a conclusion that he killed out of a necessity to avoid arrest. No evidence was presented that Flowers expressed an intent to kill to avoid arrest.

¶ 300. The Majority finds that this aggravating factor instruction is supported by two facts: Flowers knew his victims and Flowers disposed of evidence after the killings. The second can be disposed of easily because it bears no logical connection to the question at hand. Regardless of the reason someone commits murder, that person usually has an incentive to dispose of the evidence. Said differently, if Flowers killed his victims out of pure anger, he would have an

incentive to cover up the killing by disposing of evidence. The same could be said if Flowers killed because the victims resisted the robbery. Showing that Flowers disposed of evidence after the killing makes it no more reasonable to conclude that he killed to avoid arrest.

¶ 301. Likewise, the Majority's reliance on the fact that Flowers knew his victims is misplaced. First, by the Majority's own statement, this rationale applies to one victim. The majority states:

> The State's theory was that Flowers intended to kill Bertha Tardy because she fired him and withheld his pay and, in the process of doing so, he shot and killed the others. Flowers knew Carmen Rigby from working at the store, but there is no evidence that he knew Robert Johnson or Derrick Stewart, as the day of the murders was their first day to work at the store.

This statement acknowledges that Flowers killed Tardy—not to avoid arrest—but for revenge. The Majority admits that Flowers did not know Johnson or Stewart. So at best, the Majority's reliance on this evidence relates to Rigby alone. But even there it cannot provide sufficient evidence to grant the instruction. It is simply inaccurate to say that a reasonable juror could conclude beyond a reasonable doubt that Flowers killed Rigby to avoid arrest, simply because they had worked together.

¶ 302. True, this Court has supported an instruction on this aggravating factor in the past based

solely on the fact that the victim knew the defendant and could identify him. *Wiley*, 750 So.2d at 1206. But if we are to enforce the burden of proof required of the State, this was error. Allowing a jury to consider an aggravating factor based on nothing more than pure speculation cannot reach the level of proof beyond a reasonable doubt. Because the State presented insufficient evidence from which a reasonable juror could find this aggravating factor beyond a reasonable doubt, I would reverse Flowers's sentence of death and remand for a new sentencing hearing.

**KITCHENS, P.J., JOINS THIS OPINION. WALLER, C.J., JOINS IN PART WITH OPINION.**

APPENDIX

**DEATH CASES AFFIRMED BY THIS COURT**

***Timothy Nelson Evans v. State***, 226 So.3d 1 (Miss. 2017).

***James Cobb Hutto III v. State***, 227 So.3d 963, 2014-DP-00177-SCT, 2017 WL 2001157 (Miss. May 11, 2017).

***David Cox v. State***, 183 So.3d 36 (Miss. 2015).

***David Dickerson v. State***, 175 So.3d 8 (Miss. 2015).

***Timothy Robert Ronk v. State***, 172 So.3d 1112 (Miss. 2015).

***Curtis Giovanni Flowers v. State***, 158 So.3d 1009 (Miss. 2014). *following remand.

***Caleb Corrothers v. State***, 148 So.3d 278 (Miss. 2014), *leave to seek PCR granted in part and denied in part* (Feb. 2, 2017), *rehearing denied* (May 11, 2017).

***Jason Lee Keller v. State***, 138 So.3d 817 (Miss. 2014), *leave to seek PCR granted in part and denied in part* (May 25, 2017).

***Leslie Galloway III v. State***, 122 So.3d 614 (Miss. 2013).

***Bobby Batiste v. State***, 121 So.3d 808 (Miss. 2013), *granted leave to seek PCR* (Jan. 21, 2016).

***Roger Lee Gillett v. State***, 56 So.3d 469 (Miss. 2010).

***Moffett v. State***, 49 So.3d 1073 (Miss. 2010).

***Pitchford v. State***, 45 So.3d 216 (Miss. 2010).

***Goff v. State***, 14 So.3d 625 (Miss. 2009).

***Wilson v. State***, 21 So.3d 572 (Miss. 2009).

***Chamberlin v. State***, 989 So.2d 320 (Miss. 2008).

***Loden v. State***, 971 So.2d 548 (Miss. 2007).

***King v. State***, 960 So.2d 413 (Miss. 2007).

***Bennett v. State***, 933 So.2d 930 (Miss. 2006).

***Havard v. State***, 928 So.2d 771 (Miss. 2006).

***Spicer v. State***, 921 So.2d 292 (Miss. 2006).

***Hodges v. State***, 912 So.2d 730 (Miss. 2005).

***Walker v. State***, 913 So.2d 198 (Miss. 2005).

***Le v. State***, 913 So.2d 913 (Miss. 2005), *granted leave to seek second PCR*, 2013-DR-00327-SCT (Feb. 23, 2016).

***Brown v. State***, 890 So.2d 901 (Miss. 2004).

***Powers v. State***, 883 So.2d 20 (Miss. 2004)

***Branch v. State***, 882 So.2d 36 (Miss. 2004).

***Scott v. State***, 878 So.2d 933 (Miss. 2004).

***Lynch v. State***, 877 So.2d 1254 (Miss. 2004).

***Dycus v. State***, 875 So.2d 140 (Miss. 2004).

***Byrom v. State***, 863 So.2d 836 (Miss. 2003).

***Howell v. State***, 860 So.2d 704 (Miss. 2003).

***Howard v. State***, 853 So.2d 781 (Miss. 2003).

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***Turner v. State***, 732 So.2d 937 (Miss. 1999).

***Smith v. State***, 729 So.2d 1191 (Miss. 1998).

***Burns v. State***, 729 So.2d 203 (Miss. 1998).

***Jordan v. State***, 728 So.2d 1088 (Miss. 1998).

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***Manning v. State***, 726 So.2d 1152 (Miss. 1998).

***Woodward v. State***, 726 So.2d 524 (Miss. 1997).

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***Williams v. State***, 684 So.2d 1179 (Miss. 1996).

***Davis v. State***, 684 So.2d 643 (Miss. 1996).

***Taylor v. State***, 682 So.2d 359 (Miss. 1996).

***Brown v. State***, 682 So.2d 340 (Miss. 1996).

***Blue v. State***, 674 So.2d 1184 (Miss. 1996).

***Holly v. State***, 671 So.2d 32 (Miss. 1996).

***Walker v. State***, 671 So.2d 581 (Miss. 1995).

***Russell v. State***, 670 So.2d 816 (Miss. 1995).

***Ballenger v. State***, 667 So.2d 1242 (Miss. 1995).

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***Carr v. State***, 655 So.2d 824 (Miss. 1995).

***Mack v. State***, 650 So.2d 1289 (Miss. 1994).

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*Gray v. State*, 472 So.2d 409 (Miss. 1985).

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***Booker v. State***, 449 So.2d 209 (Miss. 1984).

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***Irving v. State***, 441 So.2d 846 (Miss. 1983).

***Tokman v. State***, 435 So.2d 664 (Miss. 1983).

***Leatherwood v. State***, 435 So.2d 645 (Miss. 1983).

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***Pruett v. State***, 431 So.2d 1101 (Miss. 1983).

***Gilliard v. State***, 428 So.2d 576 (Miss. 1983).

***Evans v. State***, 422 So.2d 737 (Miss. 1982).

***King v. State***, 421 So.2d 1009 (Miss. 1982).

***Wheat v. State***, 420 So.2d 229 (Miss. 1982).

***Smith v. State***, 419 So.2d 563 (Miss. 1982).

***Johnson v. State***, 416 So.2d 383 (Miss.1982).

***Edwards v. State***, 413 So.2d 1007 (Miss. 1982).

***Bullock v. State***, 391 So.2d 601 (Miss. 1980).

***Reddix v. State***, 381 So.2d 999 (Miss. 1980).

***Jones v. State***, 381 So.2d 983 (Miss. 1980).

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***Jordan v. State***, 365 So.2d 1198 (Miss. 1978).

***Voyles v. State***, 362 So.2d 1236 (Miss. 1978).

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***Washington v. State***, 361 So.2d 61 (Miss. 1978).

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**DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCING PHASE**

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***Edwards v. State***, 737 So.2d 275 (Miss. 1999).

***Smith v. State***, 733 So.2d 793 (Miss. 1999).

***Porter v. State***, 732 So.2d 899 (Miss. 1999).

***Kolberg v. State***, 704 So.2d 1307 (Miss. 1997).

***Snelson v. State***, 704 So.2d 452 (Miss. 1997).

***Fuselier v. State***, 702 So.2d 388 (Miss. 1997).

***Howard v. State***, 701 So.2d 274 (Miss. 1997).

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***Lanier v. State***, 684 So.2d 93 (Miss. 1996).

***Giles v. State***, 650 So.2d 846 (Miss. 1995).

***Duplantis v. State***, 644 So.2d 1235 (Miss. 1994).

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***Butler v. State***, 608 So.2d 314 (Miss. 1992).

***Jenkins v. State***, 607 So.2d 1171 (Miss. 1992).

***Abram v. State***, 606 So.2d 1015 (Miss. 1992).

***Balfour v. State***, 598 So.2d 731 (Miss. 1992).

***Griffin v. State***, 557 So.2d 542 (Miss. 1990).

***Bevill v. State***, 556 So.2d 699 (Miss. 1990).

***West v. State***, 553 So.2d 8 (Miss. 1989).

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***Davis v. State***, 512 So.2d 1291 (Miss. 1987).

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***Smith v. State***, 499 So.2d 750 (Miss. 1986).

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**DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT**

***Bell v. State***, 160 So.3d 188 (Miss. 2015).

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***Coleman v. State***, 378 So.2d 640 (Miss. 1979).

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***Fulgham v. State***, 46 So.3d 315 (Miss. 2010).

***Rubenstein v. State***, 941 So.2d 735 (Miss. 2006).

***King v. State***, 784 So.2d 884 (Miss. 2001).

***Walker v. State***, 740 So.2d 873 (Miss. 1999).

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****Pinkney v. State***, 538 So.2d 329 (Miss. 1989); ***Pinkney v. Mississippi***, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding; ***Pinkney v. State***, 602 So.2d 1177 (Miss. 1992) remanding for new sentencing hearing.

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****Jones v. State***, 517 So.2d 1295 (Miss. 1987); ***Jones v. Mississippi***, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) vacating and remanding; ***Jones v. State***, 602 So.2d 1170 (Miss. 1992) remanding for new sentencing hearing.

***Russell v. State***, 607 So.2d 1107 (Miss. 1992).

***Holland v. State***, 587 So.2d 848 (Miss. 1991).

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(Revised October 30, 2017.)

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

**Scott S. Harris**
Clerk of the Court
(202) 479-3011

November 2, 2018

Ms. Sheri Lynn Johnson
Cornell Law School
245 Hughes Hall
Ithaca, NY 14853

Re: Curtis Giovanni Flowers
v. Mississippi
No. 17-9572

Dear Ms. Johnson:

The Court today entered the following order in the above-entitled case: The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted limited to the following question: Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986), in this case.

Sincerely,

/s/ Scott S. Harris
**Scott S. Harris**, Clerk

No. 17-9572

# In The
# Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## PETITIONER'S BRIEF


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## CAPITAL CASE
## QUESTION PRESENTED

Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U. S. 79 (1986), in this case.

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover of the brief.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS AND ORDERS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| RELEVANT CONSTITUTIONAL PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| A. The First Five Trials | 3 |
| 1. The first trial and *Flowers I* | 3 |
| 2. The second trial and *Flowers II* | 6 |
| 3. The third trial and *Flowers III* | 8 |
| 4. The fourth and fifth trials | 12 |
| B. The Sixth Trial | 13 |
| 1. *Voir dire* | 14 |
| 2. The *Batson* hearing | 17 |
| C. *Flowers VI* Before and After GVR | 21 |
| SUMMARY OF ARGUMENT | 23 |
| ARGUMENT | 27 |
| I. Courts must be vigilant in ferreting out racial discrimination in the exercise of the peremptory challenge | 27 |

TABLE OF CONTENTS – Continued

Page

A. Racial discrimination in the administration of justice is intolerable ..... 27

B. Courts must diligently review evidence that a peremptory strike was racially discriminatory ..... 29

1. *Batson* requires careful consideration of all evidence of racial discrimination ..... 30

2. The persuasiveness of all the evidence of racial discrimination must be assessed cumulatively ..... 31

II. The Mississippi Supreme Court failed to consider an important indicium of discriminatory intent and failed to evaluate the cumulative evidence of racial discrimination ..... 32

A. Evans' history of prior discrimination was proximate, repeated, and egregious ..... 32

B. The Mississippi Supreme Court failed to consider Evans' history of discrimination ..... 33

1. Perseverative error ..... 34

2. The majority's reasons for perseveration ..... 34

C. The Mississippi Supreme Court failed to consider the cumulative evidence of discrimination ..... 38

TABLE OF CONTENTS – Continued


| | | Page |
|---|---|---|
| III. | Abundant evidence supports an inference of purposeful discrimination | 39 |
| | A. The strength of the *prima facie* case | 40 |
| | B. The history of discrimination | 41 |
| | C. Demeanor | 42 |
| | D. Disparate questioning | 44 |
| | E. Factual misrepresentations | 49 |
| | F. Implausible reasons | 51 |
| | G. Comparison with accepted white jurors | 53 |
| IV. | Consideration of the totality of the circumstances compels the conclusion that Evans' facially race-neutral reasons were pretextual | 53 |
| | A. Reason by reason, strike by strike | 53 |
| | B. The whole story | 58 |
| CONCLUSION | | 61 |

## TABLE OF AUTHORITIES

Page

CASES

*Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)..... 30, 40, 41, 48

*Batson v. Kentucky*, 476 U.S. 79 (1986) .....*passim*

*Buck v. Davis*, 137 S.Ct. 759 (2017).....27, 29

*Flowers v. Mississippi*, 136 S.Ct. 2157 (2016).....1, 22

*Flowers v. State*, 773 So.2d 309 (Miss. 2000) .....*passim*

*Flowers v. State*, 842 So.2d 531 (Miss. 2003) .....*passim*

*Flowers v. State*, 947 So.2d 910 (Miss. 2007) .....*passim*

*Flowers v. State*, 158 So.3d 1009 (Miss. 2014).... 1, 21, 22

*Flowers v. State*, 240 So.3d 1082 (Miss. 2017) ...*passim*

*Foster v. Chatman*, 136 S.Ct. 1737 (2016).....*passim*

*Hernandez v. New York*, 500 U.S. 352 (1991) .....41

*McClesky v. Kemp*, 481 U.S. 279 (1987).....27

*McLaughlin v. Florida*, 379 U.S. 184 (1964).....27

*Miller-El v. Dretke*, 545 U.S. 231 (2005) .....*passim*

*Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017) ..... 27

*Powers v. Ohio*, 499 U.S. 400 (1991) .....28, 29

*Purkett v. Elem*, 514 U.S. 765 (1995) (*per curiam*).....51

*Rose v. Mitchell*, 443 U.S. 545 (1979).....27, 29

*Snyder v. Louisiana*, 552 U.S. 472 (2008) .....*passim*

*Strauder v. West Virginia*, 100 U.S. 303 (1879) .....28, 29

*Stringer v. State*, 500 So.2d 928 (Miss. 1986) .....5

TABLE OF AUTHORITIES – Continued

Page

*Turner v. Murray*, 476 U.S. 28 (1986) ..... 28

*Washington v. Davis*, 426 U.S. 229 (1976) ..... 31

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI ..... 2

U.S. Const. amend. XIV ..... 2, 27, 38

28 U.S.C. § 1257(a) ..... 1

RULES

Fed. R. Evid. 404(b)(2) ..... 42

Miss. R. Evid. 404(b) ..... 5

Miss. R. Evid. 404(b)(2) ..... 42

## OPINIONS AND ORDERS BELOW

A prior decision of the Mississippi Supreme Court, reported as *Flowers v. State*, 158 So.3d 1009 (Miss. 2014), was vacated by this Court in *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016). The present decision of the Mississippi Supreme Court, issued on remand, is reported as *Flowers v. State*, 240 So.3d 1082 (Miss. 2017) (Joint Appendix ("J.A.") 299-526).[1] The order of the Circuit Court of Montgomery County, Mississippi, denying Flowers' motion for a new trial is unreported and appears at J.A. 247-298. The section of the transcript in which the Circuit Court of Montgomery County, Mississippi, denied Flowers' objection under *Batson v. Kentucky*, 476 U.S. 79 (1986), appears at J.A. 202-241.

## STATEMENT OF JURISDICTION

The Mississippi Supreme Court affirmed Flowers' convictions and sentence on November 2, 2017, and denied a timely request for rehearing on February 22, 2018. Pursuant to an extension of time granted by Justice Alito, Flowers' petition for a writ of certiorari was filed on June 22, 2018, and granted on November 2, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (2012).

[1] "J.A." refers to the Joint Appendix. "C.P." and "Tr." refer to the Clerk's Papers and Trial Transcript, respectively, submitted to the Mississippi Supreme Court in connection with the appeal of the judgment entered at Flowers' sixth trial.

## RELEVANT CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It also involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

## STATEMENT OF THE CASE

Since October 1997, petitioner Curtis Flowers, a black man, has stood trial six times as the alleged lone perpetrator of the 1996 murders of four people inside the Tardy Furniture store in Winona, Mississippi.[2] At the first two trials, the State peremptorily struck all ten black prospective jurors tendered for jury service; at the third and fourth trials, all 26 of the State's strikes were directed at black panelists; race information for strikes exercised at the fifth trial is not in the record; at the sixth trial, the State accepted the first black panelist, then struck the next five who came up for seats on the jury.

[2] As explained in section A *infra*, the first two trials concerned the murder of only one of the four victims; the remaining trials concerned all four murders.

The first three trials each ended in convictions and death sentences later reversed by the Mississippi Supreme Court. *See Flowers v. State*, 773 So.2d 309 (Miss. 2000) (*Flowers I*); *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*); *Flowers v. State*, 947 So.2d 910 (Miss. 2007) (*Flowers III*). The fourth and fifth trials "[b]oth resulted in mistrials when the jury was unable to reach a unanimous verdict during the culpability phase." J.A. 303 (*Flowers v. State*, 240 So.3d 1082, 1093 (Miss. 2017) (op. on remand)). The sixth trial produced the judgment challenged here.

District Attorney Doug Evans was the lead prosecutor at all six trials. He was also the reason the first three verdicts were reversed on appeal—the first two for willful, repeated misconduct during trial, and the third for intentionally "exclud[ing] African Americans from jury service." *Flowers III*, 947 So.2d at 937. The record and prior court decisions reveal that throughout the proceedings Evans disregarded established rules of fundamental fairness and was firmly committed to seating as few black jurors as possible.

## A. The First Five Trials.

### 1. The first trial and *Flowers I*.

Although all four victims had been killed at the same time and place, Evans indicted each homicide separately. *Flowers I*, 773 So.2d at 313.[3] He then

[3] As the Mississippi Supreme Court later observed, "there is no mystery as to why the State might choose to proceed as it did against Flowers—the odds are much better from the State's

insisted, over defense objection, on proceeding to trial only on the murder of store owner Bertha Tardy. *Id.* After a venue change from Montgomery County—where the case originated—to Lee County, the trial was held before Judge C.E. Morgan, III, in October 1997. *Id.*; J.A. 10.

The jury selection process yielded 97 qualified individuals: 75 (77%) were white, 22 (23%) were black. J.A. 11. From that panel, 36 individuals were "tendered," *i.e.*, brought forward to be either seated as a juror or peremptorily struck by a party. *Id.* Five of those 36 were black; Evans struck them all. *Id.* Flowers' counsel objected under *Batson v. Kentucky*, 476 U.S. 79 (1986), but the trial court declined to find a *prima facie* case of discrimination. J.A. 12. The all-white jury convicted Flowers and sentenced him to death. *Flowers I*, 773 So.2d at 315.

Flowers' appellate counsel asserted a *Batson* claim as the first enumerated ground for reversal, but the Mississippi Supreme Court declined to reach it, focusing instead on other forms of Evans' misconduct. *Flowers I*, 773 So.2d at 317. The first was his use of a "trial tactic or strategy . . . to continuously bring in

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viewpoint as far as securing at least one conviction and what might be deemed to be an appropriate sentence." *Flowers II*, 842 So.2d at 549. Evans' incentive to improve "the odds" was substantial: no physical or forensic evidence connects Flowers to the crime; the motive and methods ascribed to him by the State are objectively improbable; and the witnesses available to make the circumstantial case for guilt have been plagued by consistency and credibility problems.

unnecessary evidence of the other three killings thereby trying Flowers for all four murders in the same proceeding." *Id.* at 321. The court had explicitly "condemned" a similar tactic as exceeding the bounds of fairness and of Miss. R. Evid. 404(b) more than a decade earlier in *Stringer v. State*, 500 So.2d 928 (Miss. 1986), *id.* at 322, and found Evans' version in this case "far more egregious," *id.* at 321, and sufficient to require reversal, *id.* at 325.[4]

The Mississippi Supreme Court went on to find "numerous instances of prosecutorial misconduct" beyond the *Stringer* violation. *Id.* at 327. For example, Evans acted "in bad faith" when he repeatedly disregarded Mississippi's prohibition against insinuating baseless grounds for impeachment.[5] He also misled and confused the jury when he "held up" an audio tape never admitted into evidence and misrepresented its contents—first on cross examination of Flowers and later in closing argument—as proof of "inconsistencies" in Flowers' statements to law enforcement. *Id.* at 330-331. After agreeing with Flowers that "the cumulative effect of all these errors" warranted relief, the court

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[4] *See also Flowers I*, 773 So.2d at 325 ("[T]he cumulative effect of the prosecutor's pattern of repeatedly citing to the killing of the other three victims throughout the guilt phase proceedings leads us to hold that Flowers was absolutely denied a fundamental right to a fair trial.").

[5] *See id.* at 328 (recounting cross examination in which Evans falsely attributed two detailed but non-existent prior inconsistent statements to defense witness Connie Moore); *id.* at 331 (condemning Evans' use of the same tactic against Flowers' mother at the penalty phase).

reversed his conviction for the murder of Bertha Tardy and remanded the case for a new trial.

### 2. The second trial and *Flowers II*.

The second trial, for the murder of Derrick "BoBo" Stewart, took place before the Mississippi Supreme Court's decision in *Flowers I*, and thus before that court's pointed disapproval of Evans' four-for-one trial tactic. *Flowers II*, 842 So.2d at 535.

After an unsuccessful attempt to select a "fair and impartial jury" in Montgomery County, venue was changed to Harrison County and the case proceeded to trial, again before Judge Morgan, in March 1999. *Id.* at 535. Initial screening and removals for case-related "cause" left 49 qualified panelists: 38 (78%) were white and 11 (22%) were black. J.A. 16. Of that group, 25 white and five black panelists were tendered for seats on the jury; once again, Evans used peremptory strikes to remove each black panelist. J.A. 16-17.

In response to a *Batson* objection, the trial judge found a *prima facie* case of discrimination and required Evans to proffer his reasons for striking all five black panelists. J.A. 17-18. After further arguments from the parties, the court focused on two of the strikes and found that, as to the first, one of Evans' two proffered reasons was pretextual, and as to the second, all three of his proffered reasons were pretexts for race discrimination. J.A. 18. The court then allowed the first strike (on the theory that one of the proffered reasons was not pretextual), but disallowed the second after

finding Evans had violated *Batson*. J.A. 19. The resulting jury, containing 11 white members and one black member seated by judicial mandate, J.A. 19, convicted Flowers of the murder of Derrick Stewart and sentenced him to death. *Flowers II*, 842 So.2d at 535.

The appeal in *Flowers II* was reminiscent of *Flowers I*. As in the first trial, Evans had made heavy use of evidence and argument concerning victims other than Mr. Stewart, and had added insult to injury by doing "that which the trial judge had specifically instructed [him] not to do, namely, to introduce extensive evidence beyond the 'establishment of the crime scene.'"[6] *Id.* at 546. Also similar to the first trial, Evans broke state law during cross examination and closing argument by insinuating "without evidentiary basis" that defense witnesses had improperly attempted to influence a prosecution witness. *Id.* at 553; *see also id.* at 555.

In addition, the Mississippi Supreme Court found that Evans misrepresented witness testimony during closing argument. In one example detailed by the court, he modified by half an hour the time at which witness Sam Jones said he received a call that led to his discovery of the victims. *Id.* at 555. When defense counsel objected, Evans doubled down, declaring, "'[Jones] said he received a call around 9:30. I recall; I wrote it down.'" *Id.* at 555. In fact, neither Evans' jury

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[6] The Mississippi Supreme Court acknowledged that Evans had not had the benefit of the *Flowers I* decision by the time of the second trial, but added that he "should find little solace in th[at] fact . . . , because in *Flowers I* we made no new pronouncements of law. . . ." *Id.* at 543.

argument nor the contemporaneous notes he claimed to have made were consistent with Jones' testimony.[7] *See id.* at 556. After examining additional arguments and determining that the "cumulative effect" of the errors again required reversal, the Mississippi Supreme Court set aside Flowers' conviction for the murder of Derrick Stewart and remanded the case for another trial. *Id.* at 565.

### 3. The third trial and *Flowers III*.

The third trial occurred in Montgomery County in February 2004, with Judge Morgan presiding again. Pursuant to the Mississippi Supreme Court's mandate, the indictments relating to each of the four decedents were consolidated and tried together. *Flowers III*, 947 So.2d at 916.

Three hundred prospective jurors completed questionnaires, of whom 126 (42%) self-identified as black and 161 (54%) self-identified as white. J.A. 23; *see also Flowers III*, 947 So.2d at 936 ("At least 120 potential jurors indicated that they were of African-American descent. . . ."); *id.* (noting that in Montgomery County

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[7] The timing of this call to Jones and Jones' subsequent arrival at the furniture store was critical to Evans' theory of the case. Both of the prosecution witnesses who claimed to have seen Flowers near the store on the morning of the homicides said their sightings occurred shortly after 10:00 a.m. *See* J.A. 353-354; 455-456. If, as Jones actually testified, *Flowers II*, 842 So.2d at 556, the four victims had already been discovered at 9:30 a.m., an attentive jury might have wondered why the killer would have lingered for half an hour before fleeing the scene of his crime.

"African-American citizens comprise forty-five percent of the county's population"). While the record does not reflect the size of the panel that survived initial screening and qualification, it does indicate that a total of 45 panelists—17 black and 28 white—were tendered. J.A. 35.

Evans was allotted a total of 15 peremptory strikes: 12 for the main panel and three more for alternates. He used all 15 to remove black panelists. *Flowers III*, 947 So.2d at 917-918. When defense counsel raised a *Batson* challenge, the trial court found a *prima facie* case, but later overruled the objection because "the State had not exercised its peremptory challenges in a racially discriminatory manner." *Id.* at 916. The resulting jury consisted of 11 whites and one black person who "was seated after the State ran out of peremptory challenges." *Id.* at 936. Flowers was again convicted and sentenced to death. *Id.* at 916.

On appeal, the Mississippi Supreme Court characterized Evans' use of his peremptories as presenting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge. . . . " *Id.* at 935.[8] Individual analyses of the 11

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[8] While the main opinion addressed only the *Batson* issue, Justice Cobb's concurring opinion noted that "there were many errors during the six day trial," including Evans' having once again chosen—as he did at the trials underlying both *Flowers I* and *Flowers II*—"to cross-examine a defense witness without ever establishing a factual basis for the line of questioning." *Flowers III*, 947 So.2d at 940 (Cobb, J., joined by Dickinson, J., concurring). Assessing all of the errors "in the aggregate (including the errors noted in the majority opinion with regard to the *Batson* issue),"

panelists whose removal Flowers specifically challenged on appeal led the court to conclude that two—Vickie Curry and Connie Pittman—were struck in clear violation of *Batson*, and that the strikes of three more—Golden, Reed, and Alexander Robinson—were "suspect." *Id.*

The Mississippi Supreme Court's analysis of the record revealed that the Curry and Pittman strikes shared a characteristic not found (or at least not as readily apparent) in any of the others: when required to justify each of the strikes, the only explanations Evans gave were demonstrably false. To support the Curry strike, he claimed the juror "said she could not vote for the death penalty," *id.* at 923; the state court, however, labeled that claim an "outright fabrication[ ]," *id.* at 924. Similarly, Evans insisted that Pittman was struck for the sole reason that "she didn't believe [Flowers] did it," *id.* at 927, but the state court found "nothing in the record to support [that] contention . . . ," *id.*; *see also id.* at 928 (rejecting State's claim of "honest mistake" in light of "having found other instances of the State's racially motivated actions during the *voir dire* process"). As to those two strikes, the court went on to conclude that "the State engaged in racially discriminatory practices," and that "the trial court committed reversible error in upholding" the prospective jurors' removal. *Id.* at 939.

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Justice Cobb found "cumulative error sufficient to warrant reversal. . . ." *Id.*

If the confirmed falsehoods Evans gave to support the Curry and Pittman strikes exceeded the limits of the Mississippi Supreme Court's tolerance, the three other "suspect" strikes revealed that ample space remained within those limits. For example, while Evans' explanations for each applied at least as forcefully to one or more whites he accepted,[9] each survived with the benefit of the Mississippi Supreme Court's "great deference" to the trial court. *Id.* at 917. With respect to Golden, that deference led the court to assume the strike was justified by "physical mannerisms, vocal inflection, or demeanor" neither invoked by Evans nor otherwise noted in the record. *Id.* at 921. As to Reed and Robinson, whose removals comparative juror analysis revealed to be "problematic," *id.* at 927, and "highly suspect," *id.* at 929, respectively, Evans' proffer of at least one separate, facially race-neutral reason was enough—regardless of plausibility or logical connection to the prospective juror's desirability, and in spite of lingering suspicions of pretext.[10]

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[9] *See Flowers III*, 947 So.2d at 921 (finding that there was no "great difference, on paper, between" struck black panelist Golden and two whites accepted by Evans); *id.* at 926 (similar finding for struck black panelist Reed); *id.* at 928 (same for struck black panelist Robinson).

[10] *See Flowers III*, 947 So.2d at 926-927 (expressing "some doubts as to whether Reed actually had any connections with Flowers' family," observing that "the trial judge's wholesale acceptance of the State's proffered reasons is suspect," then concluding that, "because the trial court's findings under *Batson* are accorded great deference, even if some may be suspect, they do not rise to the point of being clearly erroneous"); *id.* at 928-929 (explaining that the "inference of pretext that can be drawn from the

**4. The fourth and fifth trials.**

Flowers' fourth trial took place before Judge Morgan in late 2007; like the third trial, this one was held in Montgomery County and involved all four indictments. J.A. 25; C.P. 1492-1493. It differed from the prior trials in that the prosecution elected not to seek the death penalty, and in that the juror qualification process yielded a relatively balanced pool of panelists—16 (44%) black and 20 (56%) white—tendered for seating or removal by the parties. J.A. 26. Evans exercised a total of 11 peremptory strikes, every one of which was directed at a black panelist. *Id.* Because of the makeup of the pool and the order in which panelists were tendered, however, the jury that heard the case was composed of seven whites and five blacks. *Id.* The proceeding ended with a mistrial after the jurors were "unable to reach a unanimous verdict. . . ." J.A. 303.

Several months later, Judge Morgan transferred the case to Circuit Judge Joseph Loper, who would preside over the fifth trial (and later, the sixth). C.P. 1492-1493. In advance of that proceeding, Flowers' defense counsel submitted a motion which detailed for the new judge Evans' systematic removal of otherwise qualified

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seeming disparity" between Evans' removal of Robinson and his acceptance of two similarly situated whites "is lessened by the fact that the State gave an additional race neutral reason," *i.e.*, Robinson's prior service on a civil jury that "voted not guilty"; adding later that, "While we do not find the trial court's ruling concerning the strike of Alexander [Robinson] to be clearly erroneous, the racial neutrality of the State's proffered reasons is highly suspect").

black citizens from the four previous juries, as well as the prior judicial determinations that Evans had violated *Batson* at the second and third trials. Based on that showing, defense counsel requested, *inter alia*, that Evans be barred from striking African Americans in the upcoming proceeding. J.A. 3-36. The motion was denied from the bench. Tr. 314.

The fifth trial was held in late September 2008. Like the fourth, this one ended in a mistrial after the jury announced its inability to "agree on a verdict." C.P. 1797. The available record indicates that Evans used five peremptory strikes, but does not reflect the race(s) of those he removed;[11] the jury that heard the case and hung was composed of nine whites and three blacks.[12]

**B. The Sixth Trial.**

Flowers' sixth trial occurred in June 2010, again before Judge Loper, and again in Montgomery County. The original special venire consisted of 600 individuals, Tr. 353; 55% self-identified as white, 42% self-identified as black, and the remaining 3% did not self-identify. J.A. 194-195. A total of 156 remained after initial qualification, Tr. 693-694, of whom approximately 72% were white and 28% were black, J.A. 195.

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[11] Evans' strikes are reflected at pp. A43-A45 of the Second Supplemental Clerk's Papers on file with the Mississippi Supreme Court.

[12] Race information for the seated jurors is drawn from their questionnaires, which are at pp. 1A-46A of the Supplemental Clerk's Papers on file with the Mississippi Supreme Court.

After additional removals for cause, the first 26 in the remaining venire were reached for tendering, striking and seating on the main panel. J.A. 202-241. Six of those 26 (23%) were black; Evans accepted the first one, Alexander Robinson, J.A. 203, then struck the next five black panelists as each came up for consideration.[13] J.A. 203-208.

As in the second and third trials, the resulting jury was comprised of 11 white members and one black member. The process by which that composition was achieved reflected the factors highlighted by the Mississippi Supreme Court as requiring—and *not* requiring—reversal in *Flowers III*.

1. ***Voir dire.***

The strikes of jurors Reed and Robinson in *Flowers III* survived review because, for each, Evans had been able to point to some facially race-neutral fact or circumstance which, when combined with "great deference" to the trial court, was enough to satisfy the Mississippi Supreme Court. At the sixth trial, Evans' approach to the *voir dire* of black panelists facilitated development of facts or circumstances similarly useful

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[13] Six more panelists came up for consideration as alternate jurors. The last of them, Beverly Williams, was black, and was accepted as the third and final alternate. J.A. 241. Because the *Batson* hearing was completed before the alternates were chosen, *see* J.A. 237-238, that portion of the jury selection process is not reflected in the description and arguments that follow.

for defeating a *Batson* challenge under the state supreme court's deferential standard.

As the Mississippi Supreme Court majority later acknowledged on appeal, Evans asked "more questions of African-American jurors than of potential white jurors." *Flowers VI*, 158 So.3d at 1048. Apart from Alexander Robinson, who was the first black panelist tendered, and the only one seated,[14] Evans asked the other five tendered black panelists (all of whom he later struck) a total of 145 questions—an average of 29 each.[15] By contrast, Evans asked the 11 whites seated on the panel a total of 12 questions, for an average of just under 1.1 questions per juror.[16]

Evans' selection of topics to probe and the depth with which he probed them also differed between

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[14] Evans' *voir dire* of Robinson was minimal; he asked a total of five questions, four of which repeated inquiries already made by the judge. *See* Tr. 1147-1148. The record does not indicate whether the Alexander Robinson who served in the sixth trial was the same Alexander Robinson whom Evans struck in *Flowers III*.

[15] *See* J.A. 71-72; 104-105 (five questions to Carolyn Wright); J.A. 83-85; 130-133 (28 questions to Tashia Cunningham); J.A. 69-80; 139-145 (34 questions to Edith Burnside); J.A. 73-75; 86-88; 179-182 (34 questions to Flancie Jones); J.A. 75-79; 188-190 (46 questions to Dianne Copper).

[16] *See* Tr. 1123 (zero questions to Susan O'Quinn); Tr. 1155 (three questions to Janelle Johnson); Tr. 1178 (three questions to Lillie Mae Laney); Tr. 978 (three questions to Larry Blaylock); Tr. 1190-1191 (three questions to Suzanne Winstead); Tr. 1196 (zero questions to Jennifer Chatham); Tr. 1209 (zero questions to Jeffrey Whitfield); Tr. 1223 (two questions to Barron Davis); Tr. 1255 (zero questions to Marcus Fielder); Tr. 1385 (zero questions to Emily Branch); Tr. 1412-1413 (one question to James Hargrove).

struck blacks and seated whites. Although five seated white jurors acknowledged during group *voir dire* that they or a relative had been convicted of at least one criminal offense in Montgomery County or adjacent counties, Evans did not question three of them at all about those matters,[17] and posed only three superficial questions each to the other two.[18]

When the inquiry concerned facts or circumstances about a black panelist likely to be seen as "race-neutral" by the Mississippi Supreme Court, however, Evans was notably more engaged and aggressive. For example, in both group and individual *voir dire* of Tashia Cunningham, Evans posed multiple leading questions (including a reminder that she was "under oath," J.A. 132) about whether Cunningham and Flowers' sister worked "close to" each other at the facility where both were employed. J.A. 83-85; 132. When Cunningham maintained that they did not, Evans summoned a witness, Crystal Carpenter, to take the stand and provide extrinsic evidence to contradict her. J.A. 148-150. Although Carpenter pledged to obtain and

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[17] *See* Tr. 882-883; 1196 (Juror Jennifer Chatham, whose uncle was "incarcerated over in Parchman for rape"); Tr. 884; 1385 (Juror Emily Branch, whose mother "was put on parole for embezzlement, but then she got a D.U.I. and she got convicted because she violated parole"); Tr. 884-885; 1412-1413 (Juror James Hargrove, who pled to a misdemeanor after being "charged with felony possession" and later had an "aggravated assault" connected with discharging a firearm dismissed).

[18] *See* Tr. 978 (Juror Larry Blaylock, who "had a second or third cousin that was convicted of murder" by Evans' office); Tr. 882; 1190-1191 (Juror Suzanne Winstead, whose nephew was prosecuted on drug charges by Evans' office).

deliver personnel records specifying "the particular location of every person" on the line, J.A. 151, those documents were never produced. Nonetheless, Evans later persuaded the trial judge to accept Cunningham's "situation about working so closely with Mr. Flowers' sister" as a race-neutral reason for her removal. J.A. 225.[19]

### 2. The *Batson* hearing.

After accepting the first black panelist tendered, Evans struck the remaining five: Carolyn Wright, J.A. 203; Tashia Cunningham, J.A. 205; Edith Burnside, *id.*; Flancie Jones, J.A. 208; and Dianne Copper, *id.* Pursuant to Mississippi procedure, defense counsel noted her concern after the first strike, J.A. 203, and asserted that a *prima facie* case had materialized after the third strike, J.A. 205. Judge Loper agreed, noted that "five out of six strikes were African-American," and invited Evans to "put on race-neutral reasons. . . ." J.A. 209.

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[19] Evans was similarly persistent in a series of leading questions aimed at establishing that black panelist Dianne Copper could not be fair because she lived "about two blocks or so" from the Flowers family. J.A. 76. He also aggressively questioned black panelist Edith Burnside about having been "sued by Tardy Furniture," and became argumentative as she attempted to explain that the lawsuit arose from a misunderstanding and the debt had been paid. *See* J.A. 141-142 ("Q: So there was a dispute between you and her son-in-law? A: No. It wasn't a dispute. He just—Q: Well, did you agree that you owed it? A: Yes. We had no falling out about it. . . . Q: If it wasn't no misunderstanding, why did it have to go to court? A: I'm not quite sure about that.").

Evans proffered between two and four "reasons" for each black panelist he struck. As to each of the first four struck black panelists, however, at least one of his assertions materially misrepresented the facts. For example, to justify the strikes of Carolyn Wright and Edith Burnside, Evans noted that each had been "sued" by Tardy Furniture over credit accounts, then added a further claim that each woman's wages had been "garnish[ed]" to satisfy their debts. J.A. 209; 226. The historical fact of each lawsuit was accurate, but, as the Mississippi Supreme Court later found, the garnishment claims were not. J.A. 384 ("Nothing in the record supports the contention that Wright's wages were garnished"); J.A. 399 (garnishment claim concerning Burnside "was not supported by the record").[20] With one minor exception, none of Evans' misrepresentations drew scrutiny from Judge Loper.[21]

Evans' other proffered justifications focused largely on the black panelists' knowledge of or acquaintance with defense witnesses or Flowers' relatives. *See* J.A. 209 (asserting Wright "knows almost every defense

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[20] Evans' other misrepresentations included: a claim that Wright "worked with [Flowers'] sister, Cora," J.A. 218, which had no record support; a claim that Cunningham was "a close friend" of Flowers' sister, J.A. 220, which had no record support; a claim that Burnside had "tried to deny" the Tardy lawsuit during *voir dire*, J.A. 226, which was also "not supported by the record," J.A. 399; and a claim that Flowers was Jones' "nephew," J.A. 229, when in fact he was a distant relative by marriage about whom Jones knew nothing prior to *voir dire*, *see* J.A. 179-180.

[21] The exception was Evans' claim that Wright knew Flowers' sister Cora, which the trial court rejected but did not consider for what it said about pretext. J.A. 219.

witness" and "worked with [Flowers' father] Archie"); J.A. 220 (claiming without record basis that Cunningham "is a close friend of" Flowers' sister); J.A. 226 (arguing that Flowers was "very good friends with both of [Burnside's] sons"); J.A. 229 (inaccurately describing Flowers as Jones' "nephew"); J.A. 234 (asserting that Copper "worked with two of the Defendant's family members").

Defense counsel offered rebuttals for each of Evans' claims and reminded the court of "the history of race discrimination in jury selection . . . in this particular case." J.A. 210. She also requested consideration of the apparent racial disparities in Evans' investigations and questioning of white and black panelists, and the plausibility of the stated bases for his strikes. For example, in response to Evans' introduction of an abstract of Tardy's civil judgment against Wright, counsel pointed to "the differential level of investigation" and noted that while Evans "obviously felt it important enough to go get abstracts of judgment on this African-American juror," he had made no similar inquiries into white jurors known to have had "prior legal problems. . . ." J.A. 216-217.[22] Similarly, counsel urged the judge to "go behind the facial neutrality" of a proffered reason and assess the plausibility of its relationship "to what is really a material issue in this case. . . ." J.A. 212; *see also* J.A. 227.

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[22] *See also* J.A. 227 (similar); 236 (noting differential questioning on ability to set aside opinion).

Judge Loper expressed little interest in these arguments. As to Evans' record of striking black panelists in the prior trials, the judge said nothing. He was equally unresponsive to counsel's requests for scrutiny of the plausibility of Evans' proffered reasons. *See* J.A. 211; 227-228. And in response to counsel's concern over differential questioning and investigation of black and white panelists, he did not entertain the possibility that the differences could suggest discriminatory intent, but instead answered by quipping, "Well, reckon it might be that they don't have to prove a race neutral reason for striking [a white juror with a criminal record] since they didn't strike him?" J.A. 217; *see also* J.A. 227-228 (similar); J.A. 237-238.

Having rejected the considerations urged by defense counsel, the judge followed the example set by the Mississippi Supreme Court's analysis of the three "suspect" (but sustained) strikes in *Flowers III*. Consistent with that approach, the judge applied two criteria: whether one or more of Evans' proffered reasons was facially "race-neutral," *see* J.A. 219-220; 225; 228; 229-230; 236; and if so, whether defense counsel had failed to identify an identically situated white juror who had not been struck, *see* J.A. 211; 224; 228; 236. Once both questions were answered in the affirmative for each of the black panelists Evans had struck, Judge Loper's analysis was done, and all five strikes were upheld.

The jury of 11 whites and one African American convicted Flowers and sentenced him to death. J.A. 308.

### C. *Flowers VI* Before and After GVR.

On appeal to the Mississippi Supreme Court, Flowers contended that Evans had once again engaged in race discrimination during jury selection. In support of that claim, Flowers argued, *inter alia*, that disparities in Evans' questioning and treatment of black and white panelists, and misrepresentations of the record proffered in defense of his strikes, showed that Evans' history of *Batson* violations had repeated itself. *See Flowers VI*, 158 So.3d at 1047.

Emphasizing the "great deference" accorded to the trial judge, and saying nothing about Evans' history or the Mississippi Supreme Court's own decision in *Flowers III*, a majority rejected Flowers' *Batson* claim. *Id.* at 1058. With regard to both the numbers of questions posed to black and white panelists, and the nature of the questions asked and not asked, the majority acknowledged some disparities in each category, but maintained that neither "alone" proved discrimination. *Id.* at 1048-1049, 1057.

The remainder of the majority's analysis consisted of a panelist-by-panelist assessment of each strike. As with the "suspect" strikes in *Flowers III*, the majority's touchstone remained whether Evans had proffered at least one facially race-neutral reason, not contradicted by the record, that did not also apply to an identically situated white juror;[23] individual indicators of pretext

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[23] *See, e.g., id.* at 1049 (noting that, like black panelist Wright, several white jurors "knew" many witnesses, but discounting the comparison because "the number of acquaintances was not the

were noted but never aggregated;[24] and, where necessary, reasons not proffered by Evans were invoked to support his strikes.[25] Three justices dissented.[26] *See id.* at 1088-1100.

Flowers petitioned for certiorari, contending that the Mississippi Supreme Court's failure to consider Evans' history of adjudicated purposeful discrimination during its *Batson* analysis conflicted with settled law. This Court granted certiorari, vacated the state court's judgment, and remanded "for further consideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016)." *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016) (Mem.).

On remand, a majority of the Mississippi Supreme Court determined that neither *Foster* nor *Miller-El v.*

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sole reason given by the State, so the basis is not an automatic showing of pretext").

[24] *See, e.g., id.* at 1050, 1055-1056 (noting, but drawing no inferences from, Evans' false garnishment claims concerning Wright and Burnside).

[25] *See, e.g., id.* at 1050 (invoking questionnaire response by Wright that was not included among Evans' proffered justifications); *id.* at 1052 (finding fact that Copper "lived in the same neighborhood as the Flowers family" supported her removal, though Evans made no similar argument).

[26] In addition to the *Batson* violation, the three dissenters also found "three instances of the prosecution arguing facts not in evidence" which were "notably similar" to those condemned in *Flowers II*. *Id.* at 1083 (King, J., joined by Dickinson, P.J., and Kitchens, J., dissenting). A separate dissenting opinion further found error in the trial court's exclusion of a defense expert intended to challenge the cross-racial identification testimony of State's witness Porky Collins. *Id.* at 1076-1080.

*Dretke*, 545 U.S. 231 (2005), offered any pertinent lessons on the relevance of a prosecutor's history to the assessment of a *Batson* claim. *See* J.A. 362-371; 377-378. The majority further declared that "the historical evidence of past discrimination [in this case] does not alter our analysis," J.A. 379, then reproduced, verbatim, the merits discussion set forth in its pre-GVR opinion.

This Court granted certiorari.

## SUMMARY OF ARGUMENT

The prohibition against racial discrimination in jury selection serves multiple ends. It shields individual defendants from discriminatory and arbitrary enforcement of the law; it protects potential jurors' right to participate in the administration of justice, and to be treated with respect while doing so; and it prevents the undermining of public confidence in the criminal justice system. All of those values were diminished by the Mississippi Supreme Court's perfunctory treatment of the evidence of discrimination in this case.

The first four times Evans prosecuted Flowers, he struck every black panelist that he could, 36 in all. At two of those trials, Evans was found to have discriminated in his use of peremptory challenges. At the sixth trial, Evans accepted the first black panelist, then struck the remaining five, proffering facially neutral reasons for his strikes that the Mississippi Supreme Court sanguinely accepted. *Batson* requires a

"sensitive inquiry" into all of the indicia of discriminatory intent, and a cumulative assessment of the evidence uncovered by that inquiry. Nonetheless, the Mississippi Supreme Court ignored Evans' history in determining whether the race-neutral reasons Evans proffered were pretextual; deferentially reviewed each proffered reason; and never considered the totality of the evidence of racial motivation. After this Court vacated the state court's decision and remanded for further consideration in light of *Foster*, the state court insisted that Evans' history was irrelevant, and adhered to its prior analysis. That decision, like the pre-GVR decision, cannot be squared with *Batson*.

The Mississippi Supreme Court limited its inquiry to a very narrow question: Whether Evans stated a race-neutral reason for each of his strikes that was neither directly contradicted by the record nor squarely applicable to a white juror he did not strike. This he had managed to do. But because some stated reasons are pretextual, *Batson* requires more. Evans had already shown himself, at least twice in this same case, to be willing both to violate the Constitution and to try to conceal his racial motivation. Given that very proximate history of discrimination and dissembling, any court reviewing the evidence of discrimination was obliged to be skeptical of Evans' stated reasons.

Examination of the cumulative evidence of racial motivation in light of Evans' history compels the conclusion that race, once more, was the determining factor in both his questioning and his strikes. From the reversal in *Flowers III*, Evans should have learned the

constitutional mandate of racial neutrality. Instead, he learned how to avoid what, in its limited review, the Mississippi Supreme Court regarded as the markers of racial motivation.

Rather than renouncing racial discrimination, Evans took some pains to conceal it. Because *Flowers III* focused on the strength of the *prima facie* case made when he used all 15 of his strikes against black panelists, Evans created a slightly weaker *prima facie* case by accepting the first black panelist and striking one white panelist. Similarly, because the Mississippi Supreme Court had accepted without scrutiny strikes Evans claimed were based upon acquaintance with Flowers' family, he focused his *voir dire* questions on such relationships. That effort, however, revealed its own disparities as Evans ignored the relationships suggested by the *voir dire* responses of white panelists but aggressively probed black panelists (and, in one instance, summoned an outside witness to provide extrinsic evidence) for relationship information capable of supporting a strike.

*Flowers III* also taught that while demonstrably false reasons for strikes might be rejected, their falsity would neither damage Evans' overall credibility, nor cast doubt on the sincerity of other stated reasons. That guidance, too, was reflected in the proceedings below; Evans offered at least four assertions of fact—one each for four different black panelists—that were devoid of record support, and the state court drew no adverse inferences from those misrepresentations.

Finally, *Flowers III* made plain that in the eyes of the state court, the implausibility of stated reasons would not impeach them. One would expect that a lawyer concerned about possible bias against his side would have pursued the most troubling suggestions of such bias and paid little or no attention to possibilities far less likely to produce antipathy, but Evans did the opposite. He made no effort to follow up when white panelists disclosed facts or circumstances suggestive of bias (*e.g.*, their or their relatives' own criminal convictions by Evans' office or other prosecutors). But when he discovered that two black panelists had been sued over credit accounts by an heir of one of the four victims, he worked hard (and again resorted to extrinsic evidence) to establish that the long-resolved, non-contentious lawsuits justified the panelists' removal.

The Mississippi Supreme Court majority rejected Flowers' *Batson* claim after ignoring many of these indicia of discrimination and failing to draw ready inferences about pretext and Evans' credibility from those it did recognize. Proper assessment of the totality of the record, however, dictates a different result. Evans' history of striking black panelists in the Flowers trials—including the most recent one—is lengthy and stark, and his conduct before the trial court below bears numerous hallmarks of a prosecutor still bent on seating as few black jurors as possible. Though his methods show signs of refinement after a half-dozen trials, the evidence, "viewed cumulatively," is still "too

powerful to conclude anything but discrimination." *Miller-El*, 545 U.S. at 265.

## ARGUMENT

### I. Courts must be vigilant in ferreting out racial discrimination in the exercise of the peremptory challenge.

#### A. Racial discrimination in the administration of justice is intolerable.

Racial discrimination in the administration of justice "strikes at the core concerns of the Fourteenth Amendment and at the fundamental values of our society and our legal system." *Rose v. Mitchell*, 443 U.S. 545, 564 (1979). Because "the power of the State weighs most heavily upon the individual" in criminal cases, *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964), "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious" in that context, *Rose*, 443 U.S. at 555; *see also Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017) (quoting this language from *Rose*); *Buck v. Davis*, 137 S.Ct. 759, 778 (2017) (same).

Therefore, in criminal cases courts "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin*, 379 U.S. at 192. This is nowhere more true than in jury selection. The jury's indispensable role as "'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice,"'" *Pena-Rodriguz*, 137 S.Ct. at 868 (quoting *McClesky v. Kemp*, 481 U.S. 279, 310 (1987) (quoting,

in turn, *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879))), means that racial discrimination in jury selection threatens the gravest of harms to criminal defendants.[27]

Prospective jurors, too, stand to be harmed by racial discrimination. For that reason, prohibitions against it were "designed 'to serve multiple ends,' only one of which was to protect individual defendants from discrimination in the selection of jurors." *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (internal citations omitted).

> The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority. . . .

*Strauder*, 100 U.S. at 308.

More broadly still, the harm from discrimination affecting the composition of the jury "extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87. Such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the

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[27] This reality, true in any criminal case, is especially pertinent in capital cases due to the "complete finality of the death sentence," and the "unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35, 45 (1986).

judicial process." *Rose*, 443 U.S. at 556; *Buck*, 137 S.Ct. at 778 ("[Such discrimination] injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") (quoting *Rose*). Such doubt, in turn, undermines "public confidence" in the criminal justice system and fosters community suspicion that a verdict may not have been "given in accordance with the law by persons who are fair." *Powers*, 499 U.S. at 413.[28] In short, "[a]ctive discrimination by a prosecutor" during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law," and it "cannot be tolerated." *Id.* at 412.

### B. Courts must diligently review evidence that a peremptory strike was racially discriminatory.

More than a century ago, *Strauder* held that a state denies an African-American defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Batson* held that a potential juror may not be excluded from jury service through a peremptory challenge based on racial animosity or stereotypes any more than he may be excluded from the

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[28] *See also id.* ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in those terms if the jury is chosen by unlawful means at the outset.").

venire for such reasons. *Batson*, 476 U.S. at 88. Nor may he be struck based on an assumption that a black juror "will be biased in a particular case simply because the defendant is black." *Id.* at 97.

To give effect to these prohibitions, *Batson* established a three-step procedure for detecting racial motivation in peremptory strikes: *first* the defendant must establish a *prima facie* case of racial discrimination; *second*, the prosecutor may offer race-neutral reasons for the strike(s); and *third*, the court must determine whether the defendant has met his burden of proving purposeful discrimination. *Id.* at 96-97; 98.

### 1. *Batson* requires careful consideration of all evidence of racial discrimination.

"In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). As *Miller-El v. Dretke*, 545 U.S. 231 (2005), observed, *Batson*'s individualized focus was susceptible to weakening because of its emphasis on the particular reasons a prosecutor might give: "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama*, 380 U.S. 202 (1965)]." *Miller-El*, 545 U.S. at 239-240. *Batson*'s third step was intended to address the

possibility that a prosecutor's stated reasons are false, and *Batson* invites a defendant to rely upon "all relevant circumstances" to meet his burden. *Id.* at 240 (citing *Batson*, 476 U.S. at 96-97).

Among the indicia *Miller-El* identified as "bear[ing] upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El*, 545 U.S. at 240; "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," *id.* at 241; failure to *voir dire* on the reasons purportedly grounding a strike, *id.* at 244; "how reasonable, or how improbable, the explanations are . . . and [] whether the proffered rationale has some basis in accepted trial strategy," *id.* at 247; "contrasting *voir dire* questions posed respectively to black and nonblack panel members," *id.* at 255; mischaracterization of the evidence, *id.* at 244; and a history of racial discrimination by the prosecuting office, *id.* at 263.

### 2. The persuasiveness of all the evidence of racial discrimination must be assessed cumulatively.

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts. . . ." *Washington v. Davis*, 426 U.S. 229, 242 (1976). *Miller-El* did just that: "It is true . . . that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."

*Miller-El*, 545 U.S. at 265. *Foster* took the same approach: "Considering all of the [] evidence that bears upon the issue of racial animosity, we are left with the firm conviction that the strikes of [two panelists] were motivated in substantial part by discriminatory intent." *Foster*, 136 S.Ct. at 1754 (quotations omitted); *see also id.* at 1760 (Alito, J., concurring) ("I agree with the Court that the totality of the evidence now adduced by Foster is sufficient to make out a *Batson* violation.").

## II. The Mississippi Supreme Court failed to consider an important indicium of discriminatory intent and failed to evaluate the cumulative evidence of racial discrimination.

### A. Evans' history of prior discrimination was proximate, repeated, and egregious.

Across the five trials for which the numbers are available, Evans faced a total of 43 black prospective jurors while he had peremptory strikes at his disposal. He struck 41 of them and allowed only one, Robinson, to serve. In the third trial alone, Evans exercised all 15 of his strikes against African Americans—12 against prospective members of the main panel, and three more against potential alternates. *Flowers III*, 947 So.2d at 916. On appeal from that proceeding, the Mississippi Supreme Court found two clear *Batson* violations, and three more "suspect" strikes. *Id.* at 936 ("[T]hese strikes are also suspect, as an undertone of disparate treatment exists in the State's *voir dire* of these individuals."). The court went on to declare that the record presented "as strong a *prima facie* case of

racial discrimination as we have ever seen in the context of a *Batson* challenge," *id.* at 935, and characterized Evans' conduct as "evinc[ing] an effort by the State to exclude African Americans from jury service," *id.* at 937.

Moreover, *Flowers III* was not the first time Evans was adjudicated to have violated *Batson*. The trial judge in *Flowers II* had also caught him discriminating in jury selection, and responded by seating one of the black panelists Evans had struck. Thus, by the time of the trial at issue here, Evans had already amassed a remarkable record of removing black prospective jurors, and had been twice adjudicated—in this same case—for violating the rule against racially discriminatory peremptory strikes.

### B. The Mississippi Supreme Court failed to consider Evans' history of discrimination.

Despite the judicially-determined fact of repeated prior discrimination and deception, and despite the clarity of this Court's instruction that all relevant circumstances must be considered in evaluating discriminatory purpose, the Mississippi Supreme Court has twice refused to consider that history in evaluating the race-neutral reasons Evans proffered at Flowers' sixth trial. When first presented with the proof that Evans had again discriminated, that court failed to even *mention* the discrimination it had emphatically condemned in *Flowers III*, let alone assign it any weight in the assessment of Evans' conduct at the trial under review.

After this Court remanded *Flowers VI* for reconsideration in light of *Foster*, one member of the original majority, Chief Justice Waller, changed his opinion on the *Batson* issue; the remainder rationalized why they need not do so.

### 1. Perseverative error.

The post-GVR *Flowers VI* majority acknowledged the historical fact of Evans' past discrimination, *see* J.A. 378-379, but only long enough to dismiss its current relevance: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in [pre-GVR] *Flowers VI*." J.A. 379. Then, proving it meant its dismissal, the majority reproduced, word for word, its pre-GVR analysis. That analysis did not evaluate the likelihood that Evans would again violate the Constitution, as he had (at least) twice before; it did not register any skepticism of Evans' trustworthiness, despite his record of offering courts pretextual explanations; and it did not assess any of the other signs of discrimination in light of either Evans' established propensity to discriminate or his demonstrated lack of candor.

### 2. The majority's reasons for perseveration.

The post-GVR majority gave three reasons for attaching no probative value to Evans' history of discrimination and willingness to offer false explanations for his strikes. One is unsupported by the record, and all

three reflect a crabbed view of *Batson* that conflicts with this Court's precedents.

*First*, the majority credited the trial judge for having taken Evans' history into account, J.A. 373-377, but the record shows otherwise. It is true, as emphasized by the majority, that "the trial court was asked on several occasions to consider historical evidence of *Batson* violations committed by Evans in previous trials of the case." J.A. 373; *see also* J.A. 373-376 (quoting four lengthy excerpts from defense counsel's arguments). That the court was *asked* to consider those factors, however, does not mean that it did so. And while the majority also reproduced two quotes from the trial judge, neither supports its assertion that his *Batson* step-three assessment took account of Evans' history. On the contrary, both statements quoted by the majority were made before the *Batson* hearing even occurred.[29] Moreover, when the judge was asked to

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[29] The first came as the judge denied a defense request to bar Evans from using peremptory strikes, and carried the clear message that, at least on that matter, history was irrelevant. *See* J.A. 374 (state court majority quoting trial judge: "'But because *Flowers III* was reversed on *Batson* is certainly no grounds for saying that they should now be denied the right to use peremptory.'"); J.A. 200 (transcript of hearing from which quote was drawn). The second conveyed the judge's observation that many black citizens were eliminated from past venires, not because of race, but because they were acquainted with Flowers or his family. *See* J.A. 376-377 (state court majority quoting trial judge: "'But you know full well from past experiences in this county because of the number of people that know Mr. Flowers. . . . [T]here is nothing that has—that has—no discrimination that's occurred that has caused this, what you call, statistical abnormality now.

consider Evans' history *during* the *Batson* hearing, his response—not quoted by the majority below—took the form of a non-sequitur.[30] Thus, rather than justifying "great deference to the trial court's determinations," J.A. 370, the portions of the record cited by the majority provide no basis for confidence that the trial judge took due account of Evans' history of discrimination and untrustworthiness. *See Miller-El*, 545 U.S. at 254 (noting "amplified" concern created by evidence "that the state court also had before it, and apparently ignored").

*Second*, while the post-GVR majority acknowledged that *Miller-El* attaches probative value to history, it quickly dismissed that precedent with a remarkable comparison: "The Court does not have evidence before it of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." J.A. 378. True, the prior policy of an office is not the same as adjudicated discrimination by the prosecutor himself. But on every plausible point of comparison, Evans' personal history is *more* probative of discriminatory intent than was the office

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It is strictly because of the prominence of his family.' "); J.A. 199-200 (transcript of hearing from which quote was drawn).

[30] *See* J.A. 210-211 (Defense counsel: "And we think it is, therefore, pretextual specific and particularly in light under—of the history of race discrimination in jury selection in this district and in this particular case found by the Mississippi Supreme Court in *State v. Flowers* after the third trial, the first one in this district." The court: "Have you found any white jurors who were not struck who had been sued by Tardy Furniture? And have you found any who have worked with Mr. Archie Flowers?").

policy in *Miller-El*: A *policy* is less probative than a confirmed *action*, particularly an action taken more than once; a practice used against the *same defendant* in a trial of the *same case* is more probative than a practice in an unrelated case; a policy adopted by an *office* is less probative than an action taken by the same *person* whose credibility is at issue; and an action taken *after a practice is declared illegal* is more probative of willingness to break the law than is an action taken before such a declaration.

*Third*, rather than drawing guidance from *Foster* in accordance with this Court's GVR mandate, the majority opted for an obvious but unhelpful distinction: "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." J.A. 362. While that much was true (as demonstrated by the majority's lengthy description of *Foster*'s facts, *see* J.A. 362-368), neither that observation nor anything else in the majority's discussion explains its declaration later in the opinion that the prior *Batson* violations in this case "do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." J.A. 377. Nor is that declaration explainable any other way, for regardless of whether one marker of propensity to discriminate (*e.g.*, a history of violating *Batson*) "undermine[s]" a prosecutor's credibility in exactly the same way "as" another (*e.g.*, the prosecutor's notes in *Foster*),

the fact remains that *both* markers are highly probative on the real question of discriminatory intent.[31]

Taken together, the majority's attempts to distinguish this case from *Miller-El* and trivialize *Foster* suggest a fundamental error: It read this Court as more concerned with prohibiting certain specific markers of racial discrimination than with eradicating the discrimination itself. But the Equal Protection Clause of the Fourteenth Amendment does not command discreet racial discrimination, it forbids racial discrimination. *Batson*, *Miller-El*, and *Foster* all reflect that mandate, and direct that courts carry it out by examining all of the relevant and probative evidence.

### C. The Mississippi Supreme Court failed to consider the cumulative evidence of discrimination.

The post-GVR majority acknowledged Flowers' complaint that the previous majority's analysis "did not follow the 'totality-of-the-circumstances approach' used in *Foster*," but instead "confined itself to evaluating each piece of evidence of pretext in isolation,

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[31] It is also far from obvious that the jury selection file in *Foster* was more "despicable" than is Evans' record of violating *Batson* in at least two prior trials. The "B" notations in *Foster* were a telltale sign that unconstitutional racial bias was afoot; Evans' prior adjudications in this case are firm proof that he repeatedly acted in service of such bias. To suggest that the former matters in a *Batson* step-three analysis but the latter does not, as the majority below did, is to misunderstand the object and operation of that analysis completely.

affording the prosecutor the benefit of the doubt where the evidence was ambiguous." J.A. 368-369. The majority's answer to that complaint, however, was not that it was wrong, *i.e.*, that the original opinion *had* included the requisite cumulative analysis. Instead, its answer was that Flowers had received all he was due because defense counsel had been heard to *argue* for consideration of the "totality of the circumstances," and because the trial judge "also considered other circumstances showing that Evans *did not have* discriminatory intent." J.A. 376 (emphasis added). Needless to say, neither of these observations can substitute for a proper *Batson* analysis.

In sum, trial counsel urged the trial court to assess the totality of the circumstances just as appellate counsel urged the appellate court to do the same. Neither heeded those requests, nor, more importantly, the precedent of this Court.

## III. Abundant evidence supports an inference of purposeful discrimination.

At trial, Flowers made the "*prima facie* showing that race was the criteria for the exercise of the peremptory strike," and Evans "c[a]me forward with [] neutral explanation[s] for challenging black jurors." *Batson*, 476 U.S. at 96-97. The only question, therefore, was whether the race-neutral explanations were pretexts for racial discrimination. *Id.*

From the reversal in *Flowers III*, Evans should have learned the constitutional mandate of racial

neutrality. He did not. Instead, he learned the limited lesson he wanted to learn: how to avoid what the Mississippi Supreme Court regarded as the most obvious markers of racial motivation. Close examination of "all of the circumstances that bear upon the issue of racial animosity," *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El*, 545 U.S. at 239), reveals a surfeit of evidence that in his sixth trial of Flowers, Evans did not renounce racial discrimination, but merely made more efforts to conceal it.

### A. The strength of the *prima facie* case.

The strength of the *prima facie* case is often the first indicium of discriminatory motive. *Miller-El*, 545 U.S. at 240-241; *see also*, *Arlington Heights*, 429 U.S. at 266 ("The impact of the official action whether it bears more heavily on one race than another, may provide an important starting point.") (internal citations omitted). As in *Miller-El*, one black juror and 11 white jurors served at Flowers' sixth trial. After for-cause challenges, more than a quarter of the venire was black; after peremptory challenges, one twelfth of the jury was black. Another reflection of Evans' actions "bear[ing] more heavily on one race than another," *id.*, is the rate at which he struck black and white panelists; he removed 83% (5 out of 6) of the black prospective jurors tendered, but a mere 5% (1 out of 20) of the whites.

The *Flowers III* reversal castigated Evans for "as strong a *prima facie* case of racial discrimination as we

have ever seen in the context of a *Batson* challenge," *Flowers III*, 947 So.2d at 935; it told Evans he could not strike every black panelist tendered, and that he should not spend all of his strikes on black panelists. So, in *Flowers VI* he kept one black juror and struck one white panelist.

### B. The history of discrimination.

*Miller-El* highlighted the Dallas County District Attorney's Office's specific, antecedent policy of systematically excluding black prospective jurors as "a final body of evidence that confirms th[e] conclusion" of race discrimination. *Miller-El*, 545 U.S. at 263; *see also Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."). On the question of propensity to discriminate, Evans' history must be given significantly more weight than the history of the office was given in *Miller-El*, because on every relevant point—the identity of the actor, the similarity of the action, and the legality at the time of the prior action—it is more probative.

Evans' history also bears on the question of purposeful discrimination in a way the history in *Miller-El* did not: it affects his credibility. The object of the step-three inquiry is to evaluate whether a prosecutor's proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). To that end, it is hard to imagine a better predictor of

willingness to deceive than a documented history of dishonesty on the very matter at issue. Reams of impeachment law rest upon the firmly established proposition that propensity to be untruthful matters. Indeed, were Evans himself on trial, his history of cloaking discriminatory jury selection practices in bogus explanations would be admissible as *substantive* evidence of his "motive," "intent," "plan," or "absence of mistake." Fed. R. Evid. 404(b)(2); Miss. R. Evid. 404(b)(2).

To be sure, Evans' past discrimination does not by itself prove either present discrimination or categorical unfitness to participate in jury selection, nor does it modify the allocation of the burden at *Batson*'s third step. It does, however, inform the assessment of whether his proffered explanations for peremptory strikes should be accepted as truthful or rejected as pretexts for discrimination. Both law and life teach that a history of dishonesty on a closely related issue is highly probative of truthfulness, and that a declarant with such a history has no claim to the benefit of the doubt on close questions. For a prosecutor like Evans, those maxims require that his stated reasons be read with a skepticism that would not be appropriate absent his history.

### C. Demeanor.

In support of "great deference to the trial court's determinations under *Batson*," the state court quoted *Snyder*'s observation that "[t]he best evidence of discriminatory intent often will be the demeanor of the

attorney who exercises the challenge[.]" J.A. 371 (quoting *Snyder*, 552 U.S. at 477). But "often" is not always, and this case presents strong reasons why deference is not the most important—or even a significant—factor in evaluating Evans' motives.

Two kinds of demeanor evidence may be relevant at *Batson*'s third step: first, "the demeanor of the attorney who exercises the challenge," and, second, because "race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), [] the trial court's firsthand observations [may be] of even greater importance." *Snyder*, 552 U.S. at 477. In this case, deference to judgments regarding prospective juror demeanor is not at stake; Evans never sought to "invoke" a panelist's demeanor, and the trial court made no "observations" of a panelist's demeanor before crediting Evans' explanations for his strikes.[22] *Cf. Snyder*, 552 U.S. at 479 (declining to impute to the trial court a determination of prospective juror demeanor consistent with the prosecutor's stated reason where the court did not address that stated reason). Likewise, the trial judge here never addressed or expressed reliance upon Evans' demeanor. Instead, he mechanistically checked for the presence of a stated reason that was neither completely contradicted by the record nor belied by the existence of an unchallenged white juror possessing precisely the

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[22] On several occasions the trial court did cite demeanor when ruling on challenges for cause, thus demonstrating that it was willing to do so when demeanor mattered. Tr. 1717; 1719-1720; 1731.

same characteristic—a methodology that bore no evident reliance on demeanor.

Moreover, even if the trial court *had* made a finding that Evans' demeanor supported confidence in his truthfulness, such a finding would have to be severely discounted. It is unreasonable to rely upon an open countenance or a sincere tone of voice when the subject whose credibility is in question has previously shown himself willing and able to maintain an earnest demeanor while making statements later determined to be false. That very sequence unfolded in *Flowers III*: the trial court was taken in by Evans' explanations—presumably delivered with a reassuring demeanor—but the Mississippi Supreme Court later held in no uncertain terms that they were pretextual, *i.e.*, false.

**D. Disparate questioning.**

As the Mississippi Supreme Court majority chose to phrase it, Evans asked "more questions of African-American jurors than of potential white jurors." J.A. 404. This phrasing, however, obscures the degree of disproportion. As detailed *supra* at 15, Evans asked the five struck black panelists a total of 145 questions, but posed only a total of 12 questions to the 11 seated whites. No struck black panelist faced less than five questions, and no seated white juror faced more than three.[33]

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[33] Although there are various ways to quantify the disparity in Evans' questioning—*e.g.*, all panelists subjected to *voir dire*; all who survived challenges for cause; all who were either seated or

Without noting the size of this disparity, calculating disparity in some other way, or responding to the dissent's assertions about disparity, the state court majority was content to cite the State's response "that more questions were asked only when a potential juror's answers to *voir dire* questions were unclear or needed further elaboration." J.A. 379. That explanation is not supported by the record. Four white panelists tendered by the State—Blaylock, Waller, Fielder, and Lester—each volunteered that they had relationships with defense witnesses,[34] yet none were questioned by Evans; black panelists with similar relationships were always questioned, sometimes exhaustively, *see, e.g.*, J.A. 189-190 (Dianne Copper). The only deviation from this pattern was Alexander Robinson, the first black panelist to be tendered, and the

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struck—any numerical comparison leads to the same conclusion: Evans' interest in questioning white panelists was trivial compared to his interest in black panelists. The above analysis focuses on struck black panelists as compared to seated white jurors because considering a broader swath risks the criticism that Evans may have questioned panelists further down the list less because he knew they would not be reached. However, a broader perspective does not eliminate disparity. As the dissent calculated, Evans asked white panelists an average of less than three questions, and black panelists an average of 10 questions. Indeed, nine white panelists were asked no questions by the prosecution on individual *voir dire*, and 23 white panelists were asked no questions by the State other than generic inquiries related to bias and their understanding of a bifurcated trial. J.A. 467-468.

[34] *See* J.A. 54-64 (group *voir dire* responses indicating Blaylock, Waller, Fielder, and Lester each knew one or more of the following defense witnesses: Wayne Miller; James Taylor Williams; Liz Van Horn; Rev. Billy Little; Latarsha Blisset; Nelson Forrest).

only one Evans accepted. Why Robinson was exempted from scrutiny is not apparent from the record, unless it was because Evans was determined to thwart a *prima facie* case by accepting a single black juror, and Robinson came up first.[35]

Moreover, when a seemingly acceptable black panelist was in the box, Evans posed highly leading questions obviously designed to justify a strike. His *voir dire* of Dianne Copper was particularly suggestive of "fishing" for a facially neutral pretext. Copper had volunteered during group *voir dire* that she lived a couple of blocks from the Flowers residence, but stated that her house was not on the same street. J.A. 75-76. Evans did not ask other panelists about proximity to the Flowers residence, but after Copper offered this information, he prodded her with questions implying concern that she was a "neighbor" of the Flowers family. J.A. 77-78. Defense counsel objected to that characterization because Copper only said she lived in the general vicinity, an insignificant trait considering the small size of Winona. When urged by Evans to consider whether the proximity of her residence would affect her thinking, Copper said, "No. No it wouldn't be a problem." J.A. 77. Nonetheless, the next day, Evans

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[35] Robinson raised his hand during group *voir dire* to indicate he knew Flowers' brother Archie, Jr., but Evans did not question him on this relationship. J.A. 61. In contrast, when Evans offered race-neutral reasons for striking black juror Dianne Copper, he pointed to Copper's acknowledgement that she knew Archie, Jr. J.A. 234, 236.

asked Copper several more questions about her residence. J.A. 188-189.

Evans' *voir dire* of Copper regarding a working relationship with Flowers' sister Cora provides another example of an unusually pushy effort to secure an admission of bias after a panelist declared she had none. *See* J.A 77-78. That exchange ended with Copper responding, "Yes sir, it's possible," to Evans' leading question whether the relationship "may cause you to lean toward the defendant in the case?" J.A. 78. If there were any doubt that Copper was actually biased rather than being led to consider what was "possible," what she next volunteered—a potentially significant relationship with one of the victims—made clear that she harbored no bias favoring Flowers. *See* J.A. 78-79. But Evans declined to ask whether *that* relationship would cause her to "lean toward" the prosecution; instead, he asked a leading question that minimized the association. J.A. 79. Moreover, Copper had previously admitted numerous relationships with prosecution witnesses[36] that might just as well have led to bias toward the prosecution, but Evans did not question her about them because he did not care about her true feelings; he just wanted to manufacture a reason to strike her.

Evans' treatment of black panelist Tashia Cunningham presented an even more extreme "procedural

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[36] *See* Tr. 904 (Chief Johnny Hargrove); Tr. 906 (Clemmie Flemming); J.A. 50 (Patricia Hallmon Sullivan Odom); J.A. 51 (Odell Hallmon); J.A. 51-52 (Jerry Dale Bridges); J.A. 56 (Liz Van Horn); J.A. 67 (Danny Joe Lott).

departure," *Arlington Heights*, 429 U.S. at 267, for it involved both disparate questioning and disparate investigation—and, quite likely, an attempt to mislead the trial court. Cunningham raised her hand in group *voir dire* to state that she worked in the same place that Flowers' sister, Sherita Baskin, worked. Evans then posed multiple, aggressively leading questions about whether Cunningham and Sherita worked "close to" each other. *See* J.A. 83-85. Despite Cunningham's clear description of their working relationship as insignificant, Evans returned to the subject on individual *voir dire*. Cunningham again maintained that she did not work in close proximity to Sherita despite Evans' insistence that Cunningham "think about that for a minute," and a reminder that she was "saying that under oath[.]" J.A. 132. He followed that insinuation of perjury by summoning a witness, Crystal Carpenter, to give extrinsic evidence that Cunningham and Sherita worked "Nine or 10 inches" apart. J.A. 149. Carpenter went on to pledge that she would obtain and provide company documentation backing her account, J.A. 151-152, but that never happened, and Evans never explained the omission. He also never explained why he investigated the facially credible responses of a panelist who had otherwise been candid with him. And when challenged about that extraordinary step, he did not claim to have done comparable investigations into any white panelists. *See* J.A. 221.

While the probative value of Evans' differential questioning and investigation is obvious and substantial, the Mississippi Supreme Court majority had little

to say beyond a declaration that "evidence of disparate questioning alone is not dispositive of racial discrimination." J.A. 379.

### E. Factual misrepresentations.

In defending his strike of Carolyn Wright, Evans first cited Wright's relationships with "almost every Defense witness in this case." J.A. 209. This purported reason was produced by one of several instances of disparate questioning of black and white panelists, but it was also a half-truth, because Wright also knew many prosecution witnesses; in fact, Wright acknowledged she knew nearly as many prosecution witnesses as defense witnesses.[37] Evans then proffered a complete fabrication, declaring that Wright "knows [Flowers'] sister, Sherita," J.A. 209; that claim had no support in the record.

Evans also sought to support the removal of Wright by citing her involvement in litigation with Tardy Furniture and embellishing that otherwise innocuous fact with the false claim that "[t]hey had to garnish her wages. . . ." J.A. 209. Wright made no secret of the lawsuit, and had reported both that her debt was paid and that she harbored no "ill will" toward the Tardy family, J.A. 90-91. Evans posed no questions to her about garnishment. Instead, he waited until the *Batson* hearing to add that allegation, and when

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[37] *See* Tr. 904-906; 910-911; 917; J.A. 49-55 (Wright volunteering acquaintance with 16 prosecution witnesses); Tr. 909; J.A. 55-67 (Wright volunteering acquaintance with 19 defense witnesses).

challenged by defense counsel, attempted to bolster his claim by proffering "an abstract of justice court." J.A. 215. As the Mississippi Supreme Court later found, however, "[n]othing in the record supports the contention that Wright's wages were garnished." J.A. 384.[38]

Evans later repeated the false garnishment claim while defending the removal of a second panelist, Edith Burnside, this time adding a further claim that Burnside had "tried to deny" involvement in the suit. J.A. 226. Although the Mississippi Supreme Court found both claims were "not supported by the record," J.A. 399, it failed to recognize that Evans' false garnishment claims were "not some off the cuff remark," but were akin to the kind of "intricate story"—this one requiring specific measures to obtain external documentation to be offered as support—that this Court noted in *Foster*, 136 S.Ct. at 1750. Rather than evaluating the twice-told falsehood for what it said about Evans' real motives for removing Wright and Burnside, the state court majority was satisfied with the part of what Evans had said that was true. *See* J.A. 399 ("However, prior litigation is a race neutral basis for a peremptory strike.").

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[38] Evans went on to add one more inaccurate claim in defense of striking Wright: that she "also worked with [Flowers'] sister Cora." J.A. 218. The trial court quickly agreed with defense counsel that the record did not support Evans' assertion, stating, "I don't think this one worked with Cora at Shoe World." J.A. 219. If this was not a deliberate misrepresentation, it was likely an invidious "mistake." The "one" who worked with Cora at Shoe World was a different black panelist, Dianne Copper. *Id.*

The misrepresentations continued as Evans defended the strikes of Flancie Jones and Tashia Cunningham. For Jones, he asserted that she "is related to the Defendant . . . He would be her nephew." J.A. 229. The testimony, however, showed that Flowers was Jones' "sister-in-law's sister's son," and that Jones "didn't even know" about the relationship until she came to court and "could completely set it aside." Tr. 754; J.A. 180. And for Cunningham, Evans supplemented the unverified charge that she had "lied" about working near Sherita Baskin (Flowers' sister) with a further assertion—supported by nothing in the record—that she was also "a close friend" to Baskin. J.A. 220.

In sum, Evans gave at least one demonstrably false reason as support for removing four of the five black panelists he struck. While the state courts acknowledged some (and failed to see other) misrepresentations, none had any apparent influence on their assessment of Evans' credibility or the genuineness of the stated reasons for his strikes.

**F. Implausible reasons.**

Putting aside the falsity of Evans' assertions that Tardy Furniture garnished the wages of prospective black jurors Wright and Burnside, his disproportionate interest in the subject of civil suits by the Tardys was itself indicative of pretext. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*) ("At [the third] stage, implausible or fantastic justifications may (and probably

will) be found to be pretexts for purposeful discrimination."). Evans did not merely ask about the lawsuits—which the prospective jurors admitted—he went to get the resulting judgments. True, one of the victims was the then-owner of Tardy Furniture, and it would have been her son who, after her death, sued two of the struck black panelists. But both explained that the debts were paid and no ill will existed. Moreover, even if there had been *some* ill will toward Tardy's *son*, it is not plausible that any rational juror would be inclined to acquit (or even treat leniently) someone whom the evidence showed had committed *quadruple murder* merely because that juror later became engaged in a minor property dispute with a relative of one of the four victims. And if that concern were genuine rather than pretext, Evans would have made at least some effort to search out similar disputes among prospective jurors and the other three victims. As defense counsel pointed out to the trial judge, Evans made no such effort. J.A. 227. Finally, a prosecutor truly concerned with bias born of litigation surely would have probed white panelists who themselves or whose relatives had been prosecuted by his own or nearby offices. As defense counsel also argued at the *Batson* hearing, Evans did not do that either, J.A. 216; instead, he seated five such individuals on the jury. *See Snyder*, 552 U.S. at 483 ("The implausibility of this explanation is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks.").

### G. Comparison with accepted white jurors.

Because Evans' disparate questioning both failed to probe white panelists' possible bias and failed to disclose facts about them that might facilitate a more detailed assessment, comparative juror analysis cannot fully reveal the extent to which his stated reasons for striking black prospective jurors were pretextual.

Nevertheless, comparative analysis is possible on at least one measure, and it reinforces the other evidence of pretext. For all five of the black prospective jurors he struck, Evans cited their relationships with the Flowers family or with defense witnesses as a reason grounding his strike. However, that reason is not credible because Evans accepted white panelist Chesteen, who knew both of Flowers' parents, Flowers' sisters, and his brother; he also accepted four other white panelists who volunteered that they knew defense witnesses. *See supra* at n.34 (connections acknowledged by white panelists Blaylock, Waller, Fielder and Lester). The black panelists were aggressively probed for potential bias with leading questions and accusations about their honesty, but the white panelists were not.

## IV. Consideration of the totality of the circumstances compels the conclusion that Evans' facially race-neutral reasons were pretextual.

### A. Reason by reason, strike by strike.

For each of the challenged strikes, the Mississippi Supreme Court majority found at least one reason that

was neither completely contradicted by the record nor exactly applicable to a seated white juror. That other reasons Evans gave were false did not matter. That the reasons not contradicted by the record were produced by disparate questioning did not matter. That the cited differences between struck black and seated white jurors were insignificant did not matter. That the reasons were implausible did not matter. In short, the state court's analysis did not assess the likelihood that the stated, uncontradicted reasons were *genuine* rather than pretexts for discrimination.

The majority's treatment of Carolyn Wright is the most extreme, since there was evidence impeaching *all* of Evans' stated reasons for striking her. According to the majority, "Flowers's claim that the State provided 'no convincing reasons' for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture."[39] J.A. 385. However, facts indicating his *true* motivation were ignored. Regarding the purported "working relationship" with Flowers' father, the dissent noted:

> [T]he State made no effort during *voir dire* to question Wright about the working relationship

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[39] The majority also noted Wright's juror questionnaire stated that she had previously served as a juror in a criminal case involving the "Tardy Furniture trial." Evans, however, did not state this as a reason for striking Wright, and it therefore cannot support the strike. *See Miller-El*, 545 U.S. at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

> beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group *voir dire* that she was unaware of whether Archie Flowers still worked at Wal-Mart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect.

J.A. 473-474. Despite details suggesting no real working "relationship" (and despite this Court's admonition that jurors are not "cookie cutters," *Miller-El*, 545 U.S. at 247 n.6), the state court majority dismissed as "distinguishable" the work-related connection of white panelist Chesteen, a teller in the bank at which Flowers' father (and other family members) were customers. J.A. 385.

The second cited reason, Wright's acquaintance with potential witnesses, is discredited by facts about comparable white panelists Chesteen, Waller, and Lester. This discredited assertion was first put aside by the majority as not *sufficient* to show pretext, *see* J.A. 383 ("However, the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext."), and three paragraphs later, in the statement quoted above, cited as one of three *legitimate* reasons supporting the strike. J.A. 385.

Evans' third stated reason—that Wright had been sued and had her wages garnished by Tardy's—lacks credibility on at least two accounts. First, it is implausible; as discussed above, such a suit was inherently unlikely to create bias, particularly given Wright's statements that her debt was paid, and that the litigation would not affect her. J.A. 71-72. And second, Evans coupled the lawsuit excuse with the decidedly false claim that Wright's wages had been garnished. Thus, half of this stated reason was untrue and the other half was implausible; both facts are strong evidence of pretext, yet neither mattered to the majority below.

Finally, a court "sensitively" weighing the evidence of racial motivation would have found yet one more ground for doubting Evans' stated reasons for striking Wright: her juror questionnaire indicated that she "strongly favor[ed]" the death penalty. Supp. C.P. 78. At least in the eyes of a colorblind prosecutor, that response should have made Wright highly desirable; that Evans nonetheless struck her suggests that he saw races rather than individuals. *See Miller-El*, 545 U.S. at 247 ("Upon that reading, Fields should have been an ideal juror in the eyes of a prosecutor seeking a death sentence, and the prosecutors' explanations for the strike cannot reasonably be accepted.").

The state court majority's treatment of the four other struck black panelists was similarly indifferent to evidence of pretext. The majority was correct that for each of them Evans cited at least one reason with record support that did not precisely apply to a white juror he had accepted. However, given the backdrop of

*Flowers III*, only the most unsophisticated prosecutor would not have had such a reason at hand. And given that backdrop, facile inquiry was insufficient: "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Miller-El*, 545 U.S. at 240 (citing *Batson*, 476 U.S. at 96-97). Nonetheless, for none of the panelists did the majority look beyond the case at hand—or even beyond the reason at hand.

For each of those prospective jurors, powerful evidence of pretext was also present, evidence that the court dismissed simply because it found a reason that was not obviously pretextual. Moreover, the majority below invented additional reasons to bolster the strike of Dianne Copper, citing both that she "lived in the same neighborhood as the Flowers family" and that "she would rather not serve as a juror," neither of which was mentioned by Evans at the *Batson* hearing. All told, nothing about the state court's analysis of the evidence of discriminatory motive for the individual panelists matched the "sensitive inquiry" mandated by this Court.

Finally, at no point did the state court consider whether the evidence of racial animus related to one panelist might contribute to the likelihood that Evans was discriminating when he struck another. Even if the strikes of Jones, Cunningham and Burnside were *all* legitimate, the misrepresentations of the record, disparate questioning, disrespectful treatment, and implausible additional reasons that marked Evans'

treatment of them all add to the cumulative evidence of racial animus that should have been considered in evaluating the removal of Wright and Copper. *See Snyder*, 552 U.S. at 478.

### B. The whole story.

> "If anything more is needed for an undeniable explanation of what was going on, history supplies it."

*Miller-El*, 545 U.S. at 266.

Three different stories might be told to weave together the numerous, factually complicated indicia of discrimination this case presents. The first is simple denial. The State's Brief in Opposition maintained that there was no reason to believe that Evans ever discriminated, simply omitting *Flowers II* from its recitation of the facts, and reinterpreting *Flowers III* in a way that the Mississippi Supreme Court itself has never done. This is not a plausible account of the facts. But the State's choice to push a total fiction suggests the difficulty of coming up with a persuasive account of what happened that both acknowledges Evans' history of willingness to violate the Constitution and willingness to try to deceive a trial court, yet still manages to conclude that he did not again engage in purposeful discrimination.

A second take would admit that Evans twice discriminated in previous trials of the case against Flowers, but that—for some reason—he changed his ways. Perhaps he was remorseful, or perhaps he was shamed,

though there is no evidence of either in the voluminous record of this case. Or perhaps he was merely deterred by reversals. Then, however, it is hard to explain why the record of the sixth trial is littered with disparate questioning, repeated mischaracterizations, attention to substantively unimportant matters, an unusual and apparently unwarranted investigation of a black panelist, and unquestioning acceptance of white panelists who shared a characteristic cited for striking black panelists. Because if Evans were either sorry or scared, he would have been careful to treat prospective jurors the same regardless of race. Moreover, sheer carelessness would not explain why all of the errors run in the same direction.

The third and best explanation of the facts—the only explanation supported by the record and the only one a watchful community would accept—is that Evans was of a mind to discriminate. Why he was of such a mind the record does not reveal. Maybe because his case was weak enough that he also felt the need to mischaracterize evidence before the jury in at least two trials. Maybe because he thought black jurors would be skeptical of a cross-racial identification that amounted to "All blacks look alike." Maybe because he feared the ramifications of his own record of racial discrimination. Maybe because he believed all black jurors would favor a black defendant.

Whatever his reason, Evans had previously won convictions of Flowers only by breaking the rules, and in this sixth trial he broke the rules again. But this time he tried to be a little more careful to cover his

tracks. Close examination shows greater cunning, but the same purposeful discrimination on the basis of race. *See Foster*, 136 S.Ct. at 1749 ("On their face, Lanier's justifications for the strike seem reasonable enough[, but o]ur independent examination of the record [] reveals that much of the reasoning provided by Lanier has no grounding in fact."). He asked questions, not for their value in revealing bias, but for the cover their answers might give. He asked leading questions to produce answers he could cite. He did not ask white panelists as many, or as probing questions because he did not plan to strike them. He relied on differences between black and white panelists' responses that were trivial, or were produced by his own disinterest in questioning the white panelists. He went outside the courtroom to chase down remote connections in the hopes that the chase would produce a reason he could cite. And he mischaracterized the record on numerous occasions, always in the same direction: to justify the strikes of black prospective jurors.

As in *Foster*, "[c]onsidering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,'" it is impossible to avoid "the firm conviction that the strikes of [black panelists] were 'motivated in substantial part by discriminatory intent.'" *Foster*, 136 S.Ct. at 1754 (quoting *Snyder*, 552 U.S. at 478).

## CONCLUSION

For the foregoing reasons, petitioner Flowers respectfully requests that this Court reverse the decision of the Mississippi Supreme Court.

Respectfully submitted,

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No. 17-9572

# In The
# Supreme Court of the United States

CURTIS FLOWERS,

*Petitioner,*

versus

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

DID THE MISSISSIPPI SUPREME COURT ERR IN HOW IT APPLIED *BATSON V. KENTUCKY*, 476 U.S. 79 (1986)?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF THE ARGUMENT | 7 |
| ARGUMENT | 11 |
| The Decision Of The Mississippi Supreme Court On The Issue Of Petitioner's *Batson* Claims Is Consistent With This Court's Holding In *Batson* And Is Thus Not A Decision Which Is Clearly Erroneous | 11 |
| A. The Mississippi Supreme Court Committed No Error In Its Application Of *Batson* To Petitioner's Claims Of Racial Discrimination In Jury Selection | 16 |
| B. The Lack Of Any Inferential Proof Of Racial Animus In This Case Is Distinct From That Found In Both *Miller-El* And *Foster* | 22 |
| C. The Mississippi Supreme Court's Holding Regarding The Trial Court's Comparative Analysis Of Petitioner's *Batson* Claims Does Not Constitute Error | 25 |
| CONCLUSION | 50 |

TABLE OF AUTHORITIES

Page

CASES

*Anderson v. Bessemer City*, 470 U.S. 564 (1985) .....44

*Arlington Heights v. Metropolitan Housing Development Corporation et al.*, 429 U.S. 252 (1977) .....24

*Batson v. Kentucky*, 476 U.S. 79 (1986) .....*passim*

*Davis v. Ayala*, 135 S.Ct. 2187 (2015).....33

*Flowers v. State*, 842 So.2d 531 (Miss. 2003) .....11

*Flowers v. State*, 947 So.2d 910 (Miss. 2007) .... 11, 12, 21

*Flowers v. State*, 158 So.3d 1009 (Miss. 2014) .....6

*Flowers v. Mississippi*, 136 S.Ct. 2157 (2016).....6, 23

*Flowers v. State*, 240 So.3d 1082 (Miss. 2017) .....2

*Foster v. Chatman*, 136 S.Ct. 1737 (2016).....*passim*

*Hernandez v. New York*, 500 U.S. 352 (1991) ..... 14

*Higgins v. Cain*, 720 F.3d 255 (5th Cir. 2013).... 30, 43, 47

*Holland v. Illinois*, 493 U.S. 474, 110 S.Ct. 803 (1990) .....18

*Johnson v. California*, 545 U.S. 162 (2005) .....12

*Kesser v. Cambra*, 465 F.3d 351 (9th Cir. 2006).....38

*Miller-El v. Cockrell*, 537 U.S. 322 (2003)..... 13, 16

*Miller-El v. Dretke*, 545 U.S. 231 (2005) .....*passim*

*Murphy v. Dretke*, 416 F.3d 427 (5th Cir. 2005).....36

*Purkett v. Elem*, 514 U.S. 765 (1995) ..... 12, 37

TABLE OF AUTHORITIES – Continued

Page

*Rhoades v. Davis*, ___ F.3d ___, 2019 WL 334890 (5th Cir. 2019) ..... 26

*Rice v. Collins*, 546 U.S. 333 (2006) ..... 14

*Snyder v. Louisiana*, 552 U.S. 472 (2008) ..... *passim*

*United States v. Matthews*, 803 F.2d 325 (7th Cir. 1986) ..... 42

*United States v. Jimenez*, 77 F.3d 95 (5th Cir. 1996) ..... 26

*United States v. Lewis*, 593 F.3d 765 (8th Cir. 2010) ..... 43

*United States v. Thompson*, 735 F.3d 291 (5th Cir. 2013) ..... 26

*United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995) ..... 43

*White v. Wheeler*, 136 S.Ct. 456 (2015) ..... 40

*Whitus v. Georgia*, 385 U.S. 545 (1967) ..... 12

FEDERAL STATUTES

28 U.S.C. § 1257(a) (2012) ..... 2

STATE STATUTES

Mississippi Code Annotated § 97-3-19(2)(e) ..... 3

No. 17-9572

# In The Supreme Court of the United States

CURTIS FLOWERS,

*Petitioner,*

versus

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

## BRIEF FOR RESPONDENT

This matter is before the Court on the grant of a writ of certiorari from the decision of the Supreme Court of Mississippi in the case of Curtis Flowers (hereinafter "Flowers"). Specifically, the Supreme Court of Mississippi affirmed the conviction of capital murder and sentence of death imposed upon Flowers by the Circuit Court of Montgomery County, Mississippi, and Flowers seeks relief from that judgment. The Respondent, State of Mississippi (hereinafter "the

State"), respectfully submits Flowers is not entitled to any relief, whatsoever, from this honorable Court.

## OPINION BELOW

The lower court's affirmance of Flowers' conviction and sentence is reported at *Flowers v. State*, 240 So.3d 1082 (Miss. 2017), *cert. granted in part*, 139 S.Ct. 451 (2018) (Joint Appendix ("J.A.") 299-526).[1]

## JURISDICTION

The order granting the writ of certiorari in this case instructed as follows, "Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to the following question: Whether the Mississippi Supreme Court erred in how it applied *Batson v. Kentucky*, 476 U.S. 79 (1986), in this case." The Court's jurisdiction of this appeal is provided in 28 U.S.C. § 1257(a) (2012).

[1] "J.A." references the Joint Appendix. "C.P." and "Tr." reference the Clerk's Papers and Trial Transcripts, respectively, which were submitted to the Mississippi Supreme Court in support of Petitioner's appeal of his conviction and sentence of death in his sixth trial.

## CONSTITUTIONAL PROVISIONS INVOLVED

Flowers seeks to invoke the Sixth and Fourteenth Amendments to the Constitution of the United States. He fails to do so.

## STATEMENT OF THE CASE

This case arises from the July 16, 1996, execution-style murders of Bertha Tardy, Robert Golden, Derrick Stewart and Carmen Rigby, at the Tardy Furniture store in the city of Winona, Montgomery County, Mississippi. In 1997, Petitioner, Curtis Flowers, was indicted for the capital murders of Tardy, Golden, Stewart and Rigby, with the underlying felony of robbery, pursuant to Mississippi Code Annotated § 97-3-19(2)(e).

A special venire was drawn on April 20, 2010. Tr. 348. Pretrial hearings in this case took place on April 20, 2010, and June 4, 8-9, 2010. On April 20, 2010, the court heard argument and testimony regarding Petitioner's Motion for Disclosure and Supplementation of Discovery. The court heard argument on Petitioner's Motion to Bar Retrial Under the Double Jeopardy Clause of the Mississippi Constitution. Tr. 443-46. Petitioner renewed his speedy trial motion, with no further argument. Tr. 446. Flowers urged the trial court to reconsider its ruling on the Motion for Recusal of Circuit Court Judge. Tr. 454. The court also heard argument on Petitioner's Supplemental Motion to Preclude Death Penalty Procedure, and Petitioner's

Vindictiveness Misconduct Motion. Tr. 458. The court also heard argument on Petitioner's Notice of Renewal and Adoption of Motions from the Previous Five Trials. Tr. 463. Finally, the court heard argument on Petitioner's Motion for Setting of Reasonable Bail. Tr. 470.

Prior to the commencement of voir dire, on June 4, 2010, the court granted the State's Motion to Quash the subpoena of the assistant district attorney, which defense counsel issued in order to prevent the ADA from participating as an attorney for the State during Flowers' trial. Tr. 560, 565. The court also granted the State's motion to compel the summary report of proposed defense expert witness Robert Johnson. Tr. 566-67.

On June 4, 2010, jury selection began in the Montgomery County Circuit Court, the Honorable Joseph A. Loper, Jr., presiding. On June 8, 2010, Petitioner renewed his motion to bar imposition of the death penalty in this case, on the basis of racial discrimination by the State and vindictiveness by the prosecutor. Tr. 1096, 1098. Petitioner also renewed his Motion to Bar Any Retrial Under the Double Jeopardy Clause. Tr. 1102-03.

After jury selection and trial, on June 18, 2010, the jury returned verdicts finding Flowers guilty of the capital murders of Tardy, Rigby, Golden and Stewart. Tr. 3245. That same day the Circuit Court proceeded into the sentencing phase of the trial. On June 19, 2010, the jury returned the following:

We, the jury, unanimously find from the evidence beyond a reasonable doubt, that the following facts existed at the time of the capital murder:

1. That the defendant actually killed Bertha Tardy.
2. That the defendant attempted to kill Bertha Tardy.
3. That the defendant intended the killing of Bertha Tardy.
4. That the defendant contemplated that lethal force would be employed.

We, the jury, unanimously find that the aggravating circumstances of:

1. The defendant knowingly created a great risk of death to many persons
2. Capital offenses were committed while the defendant was engaged in the commission of armed robbery for pecuniary gain
3. Capital offenses were committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody

exists beyond a reasonable doubt and is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find

> unanimously that the defendant should suffer death.
>
> Barron N. Davis
> Foreman of the Jury

The jury made the same findings and returned the same judgment with respect to the other victims Rigby, Golden and Stewart. Tr. 3480, C.P. 2925-2929.

On August 4, 2010, the trial court denied Flowers' Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict. Flowers appealed that decision, represented by the Mississippi Office of the State Public Defender, Capital Defense Counsel Division. The Petitioner raised the twelve (12) claims of error for the Mississippi Supreme Court's consideration. Of primary significance in this case is the assertion of error raised by Flowers in claim number VI., in which the Petitioner asserted that:

> The jury selection process, the composition of the venire and the jury seated, and pervasive racial and other bias surrounding this matter violated Flowers's [sic] fundamental Constitutional rights protected by the Sixth and Fourteenth Amendments.

The lower court subsequently affirmed Flowers' convictions and death sentence in *Flowers v. State*, 158 So.3d 1009 (Miss. 2014) (*Flowers VI*). Flowers then filed a petition for a writ of certiorari with the Court. In *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016), the Court granted Flowers' petition, vacated the Mississippi Supreme Court's judgment in *Flowers VI*, and

remanded the case for further consideration in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016). Following the GVR remand, the Mississippi Supreme Court issued an opinion, once again affirming the trial court's holding. J.A. 299. From that decision, Flowers seeks relief with this Court.

## SUMMARY OF THE ARGUMENT

In the case *sub judice*, the State did not engage in racial discrimination during jury selection; nor were Petitioner's constitutional rights violated as the result of racial bias.

1. Peremptory strikes challenged on *Batson v. Kentucky*, 476 U.S. 79 (1986), grounds proceed as follows. As an initial matter, a defendant must establish a prima facie case of discrimination in the selection of jury members. Once a prima facie case is established, the State then bears the burden of providing racially neutral reasons for the challenged strikes. If the State gives racially neutral explanations, the defendant is allowed to rebut those explanations; if the defendant fails to provide rebuttal, the trial judge must then base his decision on those reasons given by the State. As part of that decisional process, a comparative analysis as it relates to the contested perspective jurors should be performed and was done here.

At the conclusion of that analysis, the trial court makes factual findings regarding the validity of the strikes. This Court will not disturb these findings

unless they are clearly erroneous. In considering such claims, the Court gives great deference to the fact finder's determination as to the validity of a strike.

2. Here, a special venire was called; approximately six hundred (600) individuals were called for voir dire on the first day of Petitioner's trial. Jury selection comprised thirteen hundred twenty-six (1326) pages of trial record; defense counsel asserted a *Batson* challenge after the State used a third peremptory strike against an African-American. J.A. 205. The trial court found that the use of five out of six peremptory challenges against African-American jurors was sufficient to raise a prima facie claim of discrimination under *Batson*.

The State used five peremptory strikes of African-American jurors and provided a valid race-neutral reason in support of each. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders. Wright also worked with Flowers' father, Archie. J.A. 209, 215-16, 217-19. Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham was then "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her." J.A. 220. Cunningham also worked with Flowers' sister, Sherita Baskin, on an assembly line. *Id.* Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." *Id.*

Juror 45, Edith Burnside, stated that Flowers was "very good friends with both of her sons." J.A. 226. Ms. Burnside also was sued by Tardy Furniture. *Id.* Finally, Ms. Burnside "at one point said she could not judge." J.A. 227. Ms. Burnside stated the "fact that she knew the Defendant so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." *Id.* Juror 53, Flancie Jones, was related to Flowers. "She admitted that she was related—she was cousin—or the Defendant's sister, Angela Jones, is her niece." J.A. 229. Jones also was approximately thirty minutes late for court on two separate occasions. *Id.* Moreover, Ms. Jones was "back and forth all over the place on her opinion about the death penalty."[2] *Id.* She stated during voir dire that she was in favor of the death penalty; on her jury questionnaire she stated she was strongly against the death penalty. J.A. 229. When asked about that inconsistency, Jones admitted to lying on the questionnaire. *Id.* Finally, Juror 62, Diane Copper, worked with Flowers' father. J.A. 234. She also worked with Flowers' sister at a shoe

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[2] Flowers argues the State engaged in disparate questioning of black and white jurors, noting that the State asked more questions of the black jurors than the whites. However, the white jurors Flowers identifies each stated they would have no problem following the law and were able to impose either death or life. There was nothing for the State to question when the answers were satisfactorily clear. The State questioned jurors whose answers to the court were unclear or needed further elaboration. That the State failed to ask redundant questions, simply to meet the Petitioner's quota for equalized questioning, without more, does not indicate pretext.

store. *Id.* Moreover, she stated "that she leaned toward favoring [Flowers'] side of the case." *Id.*

3. As will be shown herein, the State's explanations were race-neutral and were not the product of pretext. Petitioner's claims that the State engaged in disparate treatment, tendering white jurors who had the same characteristics as black jurors are wholly unsupported by the record. The trial court's finding that Petitioner's *Batson* claims were devoid of legal merit was not error. Thus, the Mississippi Supreme Court did not err in its application of *Batson* to the case *sub judice* and did not err in affirming the trial court's holding. The Petitioner's claims to the contrary should be denied.

4. The record clearly shows these venire members were struck based on valid race-neutral reasons which were not the product of pretext. The record also supports the Mississippi Supreme Court's holding, affirming the trial court's finding that there was no disparate treatment in the State's actions, and that Petitioner failed to adequately rebut the legally accepted race-neutral reasons for striking these venire members. A review of the record with deference to the trial court's determination of these race-neutral reasons results in but one determination, that there were no *Batson* violations in the case *sub judice*. Thus, the Mississippi Supreme Court did not err in its application of *Batson*.

## ARGUMENT

### The Decision Of The Mississippi Supreme Court On The Issue Of Petitioner's *Batson* Claims Is Consistent With This Court's Holding In *Batson* And Is Thus Not A Decision Which Is Clearly Erroneous

In the case *sub judice*, the Court granted certiorari on the limited question of whether the Mississippi Supreme Court erred in how it applied *Batson*. In an attempt to establish *Batson* error, where there is none, the Petitioner argues that the "Mississippi Supreme Court failed to consider an important indicium of discriminatory intent and failed to evaluate the cumulative evidence of racial discrimination." Pet. 32. However, the crux of Petitioner's efforts rests on what transpired in the preceding five trials in this case, with particular emphasis on what transpired in *Flowers II*[3] and *Flowers III*.[4]

In that vein, the Petitioner avers that the Mississippi Supreme Court erred by failing to "mention" what transpired in Flowers' third trial with regard to *Batson* violations and to "assign [that trial] any weight in the assessment" of his current *Batson* claims under review. Pet. 33. Following this assignment of error, the Petitioner confesses that the "post-GVR Flowers VI majority acknowledged the historical fact of [the district attorney's] past discrimination. . . ." Pet. 34. In short, the Petitioner, on one hand, argues the

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[3] *Flowers v. State*, 842 So.2d 531 (Miss. 2003).

[4] *Flowers v. State*, 947 So.2d 910 (Miss. 2007).

Mississippi Supreme Court failed to consider past discrimination but on the other hand, admits the court considered past discrimination. To be clear, Petitioner's assertion that both the trial court and court below failed to take into account the events of Flowers' second and third trials is simply untrue and is an assertion unsupported by both the record and the Mississippi Supreme Court's opinion on the matter.

Flowers avers that the court below "failed to consider the cumulative evidence of discrimination." Pet. 38. The Petitioner concludes this argument saying there exists "[a]bundant evidence [which] supports an inference of purposeful discrimination." Pet. 39. The State Respondent disagrees and submits the record supports the decision of the Mississippi Supreme Court on this matter and does not constitute a decision which is clearly erroneous nor does it conflict with the Court's holding in *Batson*. Petitioner's claims were properly adjudicated pursuant to *Batson*. There are no errors or near errors to cumulate. Thus, he is entitled to no relief on his claims.

As the Court held in *Johnson v. California*, 545 U.S. 162, 170-71 (2005), "*Batson*, of course, explicitly stated that the [Petitioner] ultimately carries the 'burden of persuasion' to 'prove the existence of purposeful discrimination.' 476 U.S., at 93, 106 S.Ct. 1712 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967)). This burden of persuasion 'rests with, and never shifts from, the opponent of the strike.' *Purkett*, 514 U.S., at 768, 115 S.Ct. 1769." Flowers has not met his burden of persuasion in this regard.

Here, the trial court had the benefit of gauging the witnesses' and prosecutors' credibility at trial, meaning, "[d]eference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *See Miller-El I, supra*, at 339, 123 S.Ct. 1029; *see also Hernandez, supra*, at 364, 111 S.Ct. 1859 (plurality opinion); *Batson, supra*, at 98, n.21, 106 S.Ct. 1712.

As stated *supra*, *Batson* requires a three-step process for adjudicating claims of racial discrimination in jury selection and that process was followed in the case at bar. "[A] defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (internal quotation marks and brackets omitted). *Batson's* third step, which is implicated in the case *sub judice*, hinges on the factual findings of the court below, findings which this Court gives due deference unless they are clearly erroneous.

Again, the Court accords great deference to the trial court in determining whether the offered explanation under the unique circumstances of the case is truly a race-neutral reason. As a result, the Court will not reverse factual findings on this issue "unless they

appear clearly erroneous or against the overwhelming weight of the evidence. One of the reasons for this is because the demeanor of the attorney using the strike is often the best evidence on the issue of race-neutrality." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). A finding of discrimination thus largely turns on credibility.

Deference then insulates the trial court from appellate reversal absent findings which are clearly erroneous. As noted *supra*, once a prima facie showing has been established, the State bears the burden of providing a race-neutral explanation for the challenged strike. The State's explanations need not rise to the level of justification as required for a challenge for cause. "The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991).

As the Court pointed out in *Batson*, "there are any number of bases on which a prosecutor reasonably may believe that it is desirable to strike a juror who is not excusable for cause." 476 U.S. at 98, n.20. The State's reasons for a strike "need not be persuasive, or even plausible; so long as the reasons are not inherently discriminatory, they will be deemed race-neutral." *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969 (2006). That said, the State, in demonstrating the strike to be devoid of a "racially discriminatory purpose," must provide a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges" which

the State clearly did in this case. *Batson*, 476 U.S. at 98. It is then the opponent of the strike who bears the burden of rebutting that race-neutral reason, by arguing disparate treatment and pretext. Disparate treatment can certainly be a potential identifier of pretext. However, that alone is by no means determinative, especially in a case where, as here, additional questions were asked of black venire members, due to their responses during voir dire. Where, as here, the State demonstrated differences in the jurors' characteristics, there can be no disparate treatment shown. Again, once neutral reasons are offered and rebuttal is either provided or not, the trial court is then vested with substantial discretion in assessing whether facially neutral reasons for peremptory challenges to potential jurors are actually serving to mask hidden motivations in shaping a jury. Whether facially neutral reasons for peremptory challenges are accurate statements or pretext is a decision left solely to the discretion of the trial court.

*Batson* originally defined the three-step analysis required in a jury-discrimination challenge, but did not articulate a specific means of accomplishing the third step. *Batson*, 476 U.S. at 98. Rather, *Batson* held only that the trial court, once race-neutral reasons are articulated after a finding of prima facie discrimination, must determine if the defendant has established purposeful discrimination. In the wake of *Miller-El*, *Snyder*, *Foster* and others, the Court has expounded on the process for adjudicating a *Batson* challenge, yet has refrained from articulating a specific method for

carrying out steps two and three of the analysis. Indeed, the Court has stated, "[w]e adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it." *Miller-El v. Cockrell*, 537 U.S. 322, 347, 123 S.Ct. 1029 (2003). Here, the record demonstrates the trial court did make those "detailed findings" in performing a comparative analysis of the contested strikes, detailing its findings at each step in that process.

### A. The Mississippi Supreme Court Committed No Error In Its Application Of *Batson* To Petitioner's Claims Of Racial Discrimination In Jury Selection

*Batson* requires a three-step process for adjudicating claims of racial discrimination in jury selection. "[A] defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203 (internal quotation marks and brackets omitted). *Batson's* third step, which is implicated in the case *sub judice*, hinges on the factual findings of the court below, findings which this Court gives due deference unless they are clearly erroneous. *Foster v. Chatman*, 136 S.Ct. 1737, 1747 (2016); *Snyder*, 552 U.S. at 477, 128 S.Ct. 1203. The Mississippi Supreme Court's holding

that the State did not engage in purposeful racial discrimination during jury selection and that Flowers' rights flowing from *Batson* were in no way violated, was not clearly erroneous. The record clearly supports that determination and thus, Petitioner's *Batson* claims must fail.

When voir dire began on June 7, 2010, the venire was comprised of sixty-seven (67) African-Americans and eighty-nine (89) whites. J.A. 372. On June 10, 2010, after conducting group and individual voir dire and excusing members for cause, eighteen (18) prospective African-American jurors remained at the beginning of the peremptory strike phase. *Id.* The State exercised five (5) strikes against the remaining pool of nineteen African-American jurors an exclusion rate of approximately 28% as compared to *Miller-El II's* 91% rate[5] and *Foster's* 100% rate.[6] Here, the prosecution's use of peremptory strikes was significantly and statistically lower than *Miller-El II*. However, numbers or percentages are part of the "totality of the relevant facts" the trial court is to consider; numbers alone do not constitute, "as a matter of law," a prima facie showing pursuant to *Batson*. *Batson*, 476 U.S. at 94. The Petitioner mischaracterizes the "numbers" with regard to the prosecution's strikes as the district attorney struck five (5) of the available eighteen (18) African-American jurors remaining, as opposed to five (5) out of six (6), as the Petitioner suggests. Pet. 40.

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[5] *Miller-El II*, 545 U.S. at 240-41.

[6] *Foster*, 136 S.Ct. at 1743.

In affirming the trial court, the Mississippi Supreme Court distinguished the case at bar from the Court's holding in *Foster*, noting that "*Foster* hinged on several apparent misrepresentations made by the prosecution" at trial, rather than a "prosecutor's history of adjudicated *Batson* violations." J.A. 362. At the outset, the State Respondent submits there are no such "smoking guns" with regard to evidence of racial animus, as was the case in both *Foster* and *Miller-El*.[7] Here there are no questionnaires, no juror notes and no district attorney files or any other tangible indicia of discriminatory intent, as was the case in both *Foster* and *Miller-El*.

Peremptory challenges, since their inception, have been utilized so "both the accused and the State [may] eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory-challenge system operates." *See Holland v. Illinois*, 493 U.S. 474, 480, 110 S.Ct. 803 (1990). "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminating extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'" *Id.* at 484 (quoting *Batson*, 476 U.S. at 91). The Petitioner, however, would seek to eliminate peremptory challenges altogether, at least, where the prosecution has committed any *Batson* violation in the past.

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[7] *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005) (*Miller-El II*).

The Petitioner's refrain at trial became a familiar one. Flowers argued that since the prosecuting attorney had been found to have committed a *Batson* violation in Petitioner's third trial, that by extension, was enough to automatically justify prohibiting the prosecutor from exercising peremptory strikes in his latest trial. Indeed, the Petitioner filed a motion to that effect. J.A. 3. The trial court properly denied the motion noting there was no precedent in support of such a request. The notion that a past *Batson* violation warrants relief automatically, in a subsequent trial, is one that is not supported by the precedent of this Court. That however, is the gist of Petitioner's arguments, that District Attorney Doug Evans should not have been allowed to exercise any peremptory strikes because in Flowers' third trial, he was determined to have committed a *Batson* violation. Petitioner cites to no relevant authority in support of this proposition, as there is none. The State Respondent submits the Petitioner misapprehends *Batson* and its progeny.

The Petitioner's relief from the *Batson* violation which occurred in his third trial was to obtain a new trial. Having availed himself of that relief, he cannot now obtain the same relief in his present case, based on what happened then. Rather, any potential relief must be confined to the events of this, his most recent conviction and sentence. Nevertheless, that is precisely what Flowers asks this Court to do, to resolve his *Batson* violation in his favor, based on what happened in his third trial. The Mississippi Supreme Court declined to extend him that courtesy and so should this Court. *Batson* simply does not support such a

conclusion, that past events categorically dictate present action and are dispositive. The Court has held that those past events should however, be considered, as they bear upon the issue. Indeed, that is the precise procedure which occurred here. Both the trial court and the Mississippi Supreme Court took those past events into consideration in their respective adjudications of the Petitioner's *Batson* claims.

As the Court held in *Foster*, "in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." 136 U.S. at 1748 (quoting *Snyder*, 552 U.S. at 478, 128 S.Ct. 1203). Certainly, any prior history of a *Batson* violation in a previous trial in the same case, by the very same district attorney, would "bear upon the issue of racial animosity" and is a circumstance to be considered, which is precisely what happened in this case. District Attorney Evans' prior history of *Batson* violations was clearly considered by the trial court and the Mississippi Supreme Court.[8]

In so doing, the Mississippi Supreme Court noted that "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations. Rather, the Court's holding in *Foster* hinged on several apparent misrepresentations made by the prosecution, evidenced by the record in conjunction with the prosecution's

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[8] J.A. 361-62.

troubling jury selection file, which had a shocking focus on race." J.A. 362-63.

As part of its inquiry, the Mississippi Supreme Court examined numerous exchanges found in the trial transcript concerning *Flowers III* history of *Batson* violations, contrary to the claims of the Petitioner. J.A. 373-77.[9] Petitioner's claim that the court failed to consider this history is simply untrue. The court specifically found "the trial court was presented with and rejected [Petitioner]'s present argument . . . [,]" and "the trial court certainly considered circumstances surrounding the previous trial as evidenced by its response to [Petitioner]'s *Batson* claim[.]" J.A. 374-77. Additionally, the court below expressly stated that, "[w]e do not ignore the historical evidence of racial discrimination in the previous trials in our consideration of [Petitioner]'s arguments. However, the historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." J.A. 378-79. The Petitioner's request for the Court to automatically assume the district attorney violated *Batson* based upon his previous violation of *Batson* in Flowers' third trial is without precedential support and is thus devoid of legal merit.

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[9] The first quoted passage appears at Tr. 1734-35; the second quoted passage appears at Tr. 1739; the third passage appears at Tr. 1764-65; the fourth quoted passage appears at Tr. 1766-67; and the fifth and final quoted passage appears at Tr. 1787-89.

### B. The Lack Of Any Inferential Proof Of Racial Animus In This Case Is Distinct From That Found In Both *Miller-El* And *Foster*

Likewise devoid of merit is the Petitioner's claim that the challenged peremptory strikes in this case rise to the level of those this Court has previously held to be violative of *Batson*. This case simply does not involve evidence of racial animus such as multiple misrepresentations by the prosecution or a troubling jury selection file.

Acknowledging this fact, and relying on the Court's holding in *Foster* for guidance in adjudicating Flowers' *Batson* claim, the court below noted that in *Foster*,

> the prosecution's jury selection file was replete with documents referencing race, including: (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in green, with a legend indicating that the green highlighting "represents Blacks"; (2) a draft of an affidavit prepared by an investigator at the request of the prosecutor, comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) handwritten notes identifying three black prospective jurors as "B# 1," "B# 2," and "B# 3"; (4) a typed list of qualified jurors with "N" (for "no") appearing next to the names of all five black prospective jurors; (5) a handwritten document titled "definite NO's" listing six names, including the names of all five qualified black prospective jurors; (6) handwritten document titled "Church of Christ"

> with notation that read: "NO. No Black Church"; and (7) the questionnaires filled out by several of the prospective black jurors, on which each juror's response indicating his or her race had been circled. [*Foster*] at 1744.

J.A. 363-61. Not one of these examples of racial animus, or any others for that matter, is present in this case.

Following the Court's GVR[10] of the case, the Mississippi Supreme Court looked to the Court's opinion in *Foster* for guidance in considering "other issues that might place our original opinion in *Flowers [VI]* in error." *Id.* In so doing, the court correctly noted that *Batson's* third step, at issue here, "turns on factual determinations, and, 'in the absence of exceptional circumstances,' requires deference to state court factual findings unless we conclude that they are clearly erroneous." *Id.* at 1119 (¶ 91) (quoting *Foster*, 136 U.S. at 1747 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008))). The court then addressed Petitioner's argument that it failed to follow *Foster's* "totality-of-the-circumstances-approach," by omitting the prosecutor's "well-documented history from its assessment of the credibility of his facially neutral reasons." J.A. 368-69. In so doing, the court noted that "'[I]n considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'" J.A. 372 (quoting *Foster*, 136 U.S. at 1748). The court correctly noted that "determining whether invidious discriminatory purpose was a motivating factor demands

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[10] (Grant, vacate, remand order). *Flowers v. Mississippi*, 136 S.Ct. 2157 (2016).

a sensitive inquiry into such circumstantial evidence of intent as may be available." *Id.* (quoting *Foster*, 136 U.S. at 1737, 1748) (citing *Arlington Heights*, 429 U.S. at 266).

The Mississippi Supreme Court correctly followed the mandate of *Batson* and its progeny in recognizing that "all of the circumstances that bear upon the issue of racial animosity must be consulted." J.A. 364-65 (citing *Foster*, 136 S.Ct. at 1748 (quoting *Snyder*, 552 U.S. at 478)). "*Foster* did not alter the great deference given to trial judges" and the "third step of *Batson* turns on factual determinations, and, 'in the absence of exceptional circumstances,' we defer to state court factual findings unless we conclude that they are clearly erroneous." J.A. 365 (citing to *Foster*, 136 S.Ct. at 1747 (quoting *Snyder*, 552 U.S. at 477)).

The court below was correct in acknowledging that "step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility." J.A. 371 (citing to *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Such an evaluation concerns the trial court's "determinations of credibility and demeanor" which are within the province of the trial judge. J.A. 372.

Just as there was no "troubling" jury file in this case, as in *Foster*, there was likewise no "evidence of a specific policy of past discrimination" as was the case in *Miller-El II*, 545 U.S. at 253, 263. The Mississippi Supreme Court expressly considered District Attorney Evans' two "past adjudicated *Batson* violations" and held they did not "overcome the deference owed to the trial judge's factual findings on which the [c]ourt's

affirmance relies." J.A. 377-78. Nothing in that determination is violative of this Court's holding in *Batson*.

### C. The Mississippi Supreme Court's Holding Regarding The Trial Court's Comparative Analysis Of Petitioner's *Batson* Claims Does Not Constitute Error

Additionally, the court below committed no error in adjudicating Flowers' *Batson* claim as it relates to Petitioner's claims of "(1) disparately questioning African-American jurors as compared to white jurors; (2) responding differently to African-American jurors' voir dire answers as compared to answers of white venire members; and (3) mischaracterizing the voir dire responses of African-American jurors." J.A. 378. The comparative analysis conducted by the trial court was consistent with *Batson* and its progeny. Thus, the decision of the Mississippi Supreme Court on this issue cannot be said to be clear error.

As the Court held in *Miller-El II* regarding comparative analysis, "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). There, the Court declined to "develop a comparative juror analysis" but "did note that the prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served." *Id.* The trial court did conduct a comparative analysis

in this case and, as will be detailed *infra*, found the State's race-neutral reasons to be valid and not the product of pretext. Additionally, the trial court found there was no disparate treatment. The Mississippi Supreme Court following its examination of the record, made the same determination.

"If a prosecutor's proffered reason for striking a panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Rhoades v. Davis*, ___ F.3d ___, 2019 WL 334890 *14 (5th Cir. 2019). "The narrow focus in this inquiry" then, is squarely on "the actual, contemporary reasons articulated for the prosecutor's decision to strike a prospective juror" and when a prosecutor gives a facially race-neutral rationale for striking a black juror, "a reviewing court must 'assess the plausibility of that reason in light of all evidence with a bearing on it.'" *Id.* (quoting *Miller-El*, 545 U.S. at 251-52). Appellate courts then, are tasked with testing "the veracity" of "timely expressed neutral reasons." *Id.*; *United States v. Thompson*, 735 F.3d 291, 297 n.14 (5th Cir. 2013) ("This court has routinely found demeanor to be a race-neutral justification."); *United States v. Jimenez*, 77 F.3d 95, 100-01 (5th Cir. 1996) (accepting prosecutor's distinction between a Hispanic juror who was struck due to potential bias against the prosecution because a close relative was convicted by federal prosecutors and two seated jurors with DWI convictions where those convictions did not involve federal prosecutors).

Flowers alleges that disparate questioning between black jurors and other jurors warrants relief in the case *sub judice*. Pet. 44. The record does not support that assertion. As the Mississippi Supreme Court held in finding "no evidence of discrimination based on the number of questions asked alone,"[11] there were valid race-neutral reasons which justified the district attorney asking more questions of certain black venire members. The record clearly shows this was not disparate questioning but rather a means of following up on a "juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial."[12] This was not a violation of *Batson*.

**Individual Venire Members**

The district attorney offered the following reasons for exercising peremptory strikes against the five African-American jurors. Juror 14, Carolyn Wright, was sued by Tardy Furniture after the murders. Wright also worked with Flowers' father, Archie. J.A. 209.

Juror 44, Tashia Cunningham, stated in her jury questionnaire that "she would not consider death or life." Cunningham then vacillated "back and forth in questioning on what her opinion was on the death penalty," so much so that the State "could not keep her."

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[11] J.A. 381.

[12] J.A. 381.

J.A. 220. Cunningham also worked with Flowers' sister, Sherita Baskin, on an assembly line but was less than forthright about the circumstances of this working relationship. For example, Cunningham stated that she "worked on the complete opposite end of the line" from Baskin, however, Cunningham's HR representative testified during voir dire that Cunningham and Baskin worked "right next to" each other "practically every day." *Id.*

Juror 45, Edith Burnside, stated that Flowers was "very good friends with both of her sons." J.A. 226. Burnside also was sued by Tardy Furniture. *Id.* Finally, Ms. Burnside "at one point said she could not judge" Flowers. J.A. 227. Burnside stated the "fact that she knew the [Petitioner] so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case." *Id.*

Juror 53, Flancie Jones, was related to Flowers. "She admitted that she was related—she was cousin—or the Defendant's sister, Angela Jones, is her niece." J.A. 229. Additionally, Jones was approximately thirty minutes late for court on two separate occasions. *Id.* Jones also was "back and forth all over the place on her opinion about the death penalty." She stated during voir dire that she was in favor of the death penalty, yet on her jury questionnaire stated she was strongly against the death penalty. When asked about that inconsistency, Jones admitted to lying on the questionnaire. *Id.*

Finally, Juror 62, Diane Copper, worked with Flowers' father and worked with Flowers' sister at a shoe store. J.A. 234. She testified "that she leaned toward favoring [Flowers'] side of the case." *Id.* Thus, the record supports the district attorney's need to ask additional questions of these venire members and their testimony supports the State's race-neutral reasons for their being struck. Petitioner's strategy at trial was to rebut the State's race-neutral reasons by claiming that the State engaged in disparate treatment by tendering white jurors who had the same characteristics as the black jurors struck. However, as the trial court correctly found, Flowers' claims of disparate treatment were totally unsupported by the record. Accordingly, neither the Mississippi Supreme Court nor the trial court committed error regarding Petitioner's claims of disparate treatment.

There simply was no disparate treatment of the individual venire members in this case. Even a cursory review of the record demonstrates that the State's articulated reasons for the strikes was not racially motivated. Each juror was questioned based on their respective responses and the race-neutral reasons provided are commensurate with the mandate of this Court's holding in *Batson* and its progeny.

### 1. Carolyn Wright

The Petitioner claims there was disparate treatment regarding venire member Carolyn Wright. Pet. 49. The Mississippi Supreme Court held the strike of

Wright to be proper noting that "Wright had worked with Flowers' father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture" and that she "wrote that she previously had served as a juror in a criminal case involving the 'Tardy Furniture trial.'" J.A. 385.

Wright worked with Flowers' father at, according to the trial judge, the "smallest Wal-Mart in existence." J.A. 385. In *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013), the Fifth Circuit held that a juror's familiarity with the defendant or his family is a race-neutral reason for a strike. Striking a juror who worked with the Petitioner or a member of his family is an accepted race-neutral reason for a strike. A juror's history of litigation with any of the parties or their attorneys is a valid race-neutral reason warranting a strike.

On rebuttal, the Petitioner claimed the State engaged in disparate treatment by failing to ask white jurors if they had ever been sued by Tardy Furniture. However, the record clearly shows that the State expressly noted that it checked every prospective juror on the list to see if anyone had been sued by Tardy, or had any sort of "run-in" with the store. Tr. 1772. Additionally, the trial court reiterated to Petitioner's counsel that the entire venire panel had been asked, one, if any of them had a charge account with Tardy; and two, if any of them had ever been sued by Tardy Furniture. That question, as the trial court clearly stated, "was not just asked of African-American jurors. . . ." Tr. 1773. When asked by the trial court whether any white

jurors tendered had been sued by Tardy Furniture, Petitioner's trial counsel responded, "no." Tr. 1765.

In rebuttal of the strike against Wright, Flowers also claimed the State tendered white Juror Pamela Chesteen, who was also an acquaintance with other witnesses and with the Flowers family. Tr. 1765. However, the record shows that Chesteen did not work with anyone in Flowers' family, as did Wright. The record also shows that the trial court inquired of Petitioner's counsel whether any white jurors tendered worked with Flowers' father. Petitioner's trial counsel responded, "no." Tr. 1765. The trial court, in denying the Petitioner's objection to the strike of Wright, found the State's reasons to be race-neutral, holding:

> So she had worked with Mr. Flowers's [sic] father. She has been sued by Tardy Furniture. I find those to be race neutral reasons. You are correct in pointing out that some of the other State—the other jurors that have been tendered by the State—some of these, you know, white jurors know some of these people. But I have not found, looking through my notes, any white jurors that worked with Mr. Archie at Wal Mart. I have not seen any indication that Tardy sued any of those. And so I think the State has offered race-neutral reasons, and I find that the Defense has failed to rebut the reasons offered by the State.
>
> * * *
>
> If—if the only reason the State offered was that she knows some of these Defense witnesses,

> then there might be something there. But the fact is knowing these Defense witnesses that you're intending to call, plus the fact that Tardy had to sue her, plus the fact that she worked with Archie, in my mind, creates race-neutral reasons for striking her. And that is the finding of this Court.

Tr. 1773-75.

The Mississippi Supreme Court's holding that Wright was properly struck is not error. Wright had been sued by Tardy Furniture. She worked with Flowers' father. These are both accepted race-neutral reasons. None of the other perspective jurors offered for comparison had been sued by Tardy and none had worked with Flowers' father, thus Petitioner's claim of disparate treatment must also fail. The decisions of the trial court and the Mississippi Supreme Court regarding Wright were not clearly erroneous and are in no way violative of the Court's holding in *Batson*.

**2. Tashia Cunningham**

The Petitioner claims error regarding the questioning of prospective juror Tashia Cunningham. Specifically, the Petitioner claims District Attorney Doug Evans' questioning of Cunningham constituted "disparate questioning and disparate investigation—and, quite likely, [was] an attempt to mislead the trial court." Pet. 48. The Petitioner is mistaken.

The court below considered Flowers' claims regarding Cunningham and held that "the blatantly

conflicting testimony of Cunningham . . . [regarding her work relationship with Flowers' sister, Sherita Baskin] was a race neutral basis for the State's challenge, as concern about a juror's honesty constitutes a race neutral reason." J.A. 396. The court further held that Cunningham's wavering answers concerning the death penalty constituted an acceptable race-neutral reason.[13] J.A. 396-97. A review of the record supports these determinations.

Regarding Cunningham's answers concerning the death penalty, the court below noted that, "[o]n her juror questionnaire, Cunningham marked that she had 'no opinion' on the death penalty but, on the very next question, she marked that she would not consider the death penalty under any circumstances." J.A. 396-97. As the court below noted, when questioned by the trial court regarding her opinion of the death penalty, "Cunningham first said she 'would not' consider the death penalty and that she 'did not believe in the death penalty.' She confirmed for the court three times that she would not consider the death penalty. However, as questioning continued, Cunningham wavered, saying she 'might' be able to consider it." J.A. 396-97. The record reflects that "Cunningham went back to her initial position that she did not think she could consider the death penalty" and then "when questioned by defense counsel . . . said that she could consider both life in prison and the death penalty." J.A. 397. Specifically, during individual voir dire, Cunningham stated that

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[13] *Davis v. Ayala*, 135 S.Ct. 2187, 2199-2201 (2015).

she was against the death penalty. However, she then equivocated on the issue:

Court: Would you or would you not be able to consider the death penalty? I mean, what's your view on even considering the death penalty?

A: I would not.

* * *

Court: Are—are you saying you would not consider it?

A: No, sir.

Q: Even if the law allowed it and the facts justified it, you just could not even consider it?

A: No, sir.

* * *

Q: So but again, just tell me again what your feelings are on the death penalty?

A: I don't believe in the death penalty.

Q: And would there be a possible—could you consider it?

A: I don't think so.

Q: You don't think so?

A: I don't think so.

Q: But there's—in our own mind, you might could—are you saying you could possibly?

A: I don't think so.

Q: See, I'm not asking you to make a—you know, you haven't heard anything. And all we want to know is whether you could consider that as a possibility—that as a sentencing possibility [. . .]

A: I might. I might. I don't know. I might.

Q: So you might be able to consider that?

A: (Nodding head).

Tr. 1293-95.

After the conclusion of this voir dire by the court, the State asked the question again:

Q: Could you consider the death penalty yourself if the facts justified it and the law allowed it?

A: I don't think so.

Tr. 1296.

Having doubts or reluctance to follow the law as well as providing inconsistent testimony is certainly a sufficient race-neutral reason warranting a strike.

Alternatively, Cunningham lied during voir dire. She repeatedly stated that while she worked with Flowers' sister on an assembly line, a sufficient reason

to justify her strike, the two did not work in close contact with one another but rather, "[s]he works at the front of the line, and I work at the end of the line." Tr. 987. However, Cunningham's quality control clerk, Crystal Carpenter, testified that she and Flowers' sister, in fact, worked "side by side," less than ten inches from each other nearly every day. Tr. 1328-29. Certainly, lying in your answers to voir dire questions is a sufficiently race-neutral reason for a strike. *Murphy v. Dretke*, 416 F.3d 427, 433 (5th Cir. 2005).

Regarding the allegation of disparate treatment of Cunningham, at trial Petitioner claimed the State tendered white Juror 30, Mr. Whitfield, who also had mixed feelings about the death penalty. Tr. 1778-79. However, as the trial court found, while Cunningham's statements were "all over the map," Mr. Whitfield's situa-tion was "greatly different [as . . . he] said from the beginning on his questionnaire that he generally favored the death penalty and could consider it." Tr. 1781-82. Petitioner also claimed that the State's decision to strike Cunningham based on the testimony of Cunningham's quality control representative (Crystal Carpenter) was pretext because the State failed to "verify" the woman's statements with documents, choosing instead to simply take her word for it. Tr. 1777. The court properly denied such argument, noting that Petitioner had presented no legal authority to support the claim that the State was required to prove Ms. Carpenter's sworn testimony was true. The trial court correctly held the "State had shown race-neutral reasons for that strike and the Defense . . . failed to

rebut that race-neutral reason that was given." Tr. 1782. However, as the court below noted, "[u]nlike Cunningham, Whitfield never said that he would be unable to impose the death penalty" and that "no white jurors survived for-cause challenges who had views on the death penalty comparable to Cunningham's views." J.A. 397-98.

The record clearly shows that Cunningham was struck because she lied about her working relationship with Flowers' sister and because of her wavering and vacillating testimony regarding the death penalty. Furthermore, as no white jurors were seated with the same characteristics, the basis for the strike was not pretextual. Thus, the holding of the Mississippi Supreme Court regarding the trial court's decision concerning the strike of Cunningham was not clearly erroneous and was consistent with *Batson*. Petitioner is entitled to no relief on this claim.

### 3. Edith Burnside

The Petitioner next claims error regarding the strike of Edith Burnside, albeit in a cursory fashion, arguing District Attorney Evans made false statements regarding this venire member.[14] Pet. 50. The

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[14] Petitioner makes numerous claims that District Attorney Evans made false representations to the trial court regarding reasons for his strikes. The Respondent disagrees and would submit that a valid, legitimate reason "is not a reason that makes sense, but [rather is] a reason that does not deny equal protection." *Purkett v. Elem*, 514 U.S. 765, 769 (1995). What is to be considered is the "genuineness of the motive" behind the racially neutral

Respondent submits the record demonstrates that Burnside, like Carolyn Wright, was also sued by Tardy Furniture. Additionally, although not apparent from the Petitioner's arguments, Burnside also equivocated on whether she could impose the death penalty:

> Court: And so I want to know if the facts justified it and the law allowed it, could you consider the death penalty as a sentencing possibility?
>
> A: [by Burnside]: That I don't think I could do. I don't know if I could do that [ . . . ] I don't—I don't know if I could consider it, sending anybody to death. I don't know if I could do that.

Tr. 1300-01.

The court continued to investigate the issue on voir dire:

> Q: And would you consider the imposition of the death penalty, if you were on the jury and it got to the second phase?
>
> A: If I was on there, yeah, I guess I'd have to.

---

reason as opposed to "the reasonableness of the asserted nonracial motive." *Id.* "To accept a prosecutor's stated nonracial reasons, the court need not agree with them. The question is not whether the stated reason represents a sound strategic judgment, but 'whether counsel's race-neutral explanation for a peremptory challenge should be believed.'" *Kesser v. Cambra*, 465 F.3d 351, 359 (9th Cir. 2006) (citing *Hernandez*, 500 U.S. at 365).

Q: So if the facts justified it and the law allowed it, you would consider it?

A: Yes.

Tr. 1301.

During individual voir dire by the State, the district attorney asked Ms. Burnside about an earlier statement she made in which she said she did not want to sit in judgment:

Q: When I was asking the questions the other day about jurors that could judge other people, you stated at that time that you could not judge anyone. Why did you state that?

A: Well, because I—you know, I prefer not to judge anyone. But when they come back and say could I be fair. My thing is I prefer not to judge anyone. But now, I will be fair.

Tr. 1305.

The State followed up on Burnside's vacillation and changed decision to "be fair" asking:

Q: So you've changed your mind, and you say now that you could judge someone; is that correct?

A: Well, basically, I haven't changed my mind. I just prefer not to be in a predicament where I have to judge somebody.

Q: So you still have a problem with judging someone?

A: I still have a problem with that.

Q: Would that problem be such that you would think about it if you were picked on a jury?

A: Well, I'd have to say yes.

Q: It would? So that might affect your judgment in this case; is that right?

A: It could, possibly, yes, sir.

Tr. 1306.

The State's reasons for striking Burnside were clearly race-neutral. A juror's views on the death penalty are a valid race-neutral reason for a strike.[15] A juror's reluctance to serve is also race-neutral reason appropriate for a peremptory challenge.

On rebuttal, the Petitioner erroneously claimed that only African-Americans had been asked whether they had been sued by Tardy Furniture. However, the record belies that allegation. Petitioner also argued Burnside testified she could be fair even though she had been sued. However, as the trial court noted, her promise to be fair was at odds with her apparent reluctance to serve, her reluctance to judge, and her belief that such reluctance would affect her judgment:

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[15] *White v. Wheeler*, 136 S.Ct. 456 (2015).

> She first stood up when the district attorney asked her if she could judge, and she said she could not. I have seen no white person that was left on this panel that responded in a similar fashion. And I've got a note here that said she stated that she'd preferred not to judge. Again, I don't have any notes that would indicate that there was any white person that said that. She was sued by Tardy Furniture. But I think the State has offered numerous race-neutral reasons for this strike, and there are not white jurors that were left on the panel that have the race-neutral reasons the State has offered for striking Ms. Burnside.

Tr. 1785-86.

The record supports the decision of the Mississippi Supreme Court regarding the strike of this venire member. The race-neutral reasons provided by the State were valid and were not the result of pretext. Additionally, no white jurors were seated who were sued by Tardy Furniture or who vacillated on the death penalty, as she did. This was not error, much less clear error, and Petitioner is entitled to no relief based on the strike of Burnside.

**4. Flancie Jones**

The Petitioner next makes another cursory argument concerning the strike of Flancie Jones saying District Attorney Evans gave "demonstrably false"

testimony concerning Jones.[16] Pet. 51. Flowers claims Evans statements regarding Jones' familial relationship to Petitioner's family was false. *Id.* To be clear, the State provided three race-neutral reasons for striking Jones.

First, she was twice late to court, stating she didn't like to get up in the morning. Tr. 1786. Lack of respect for court proceedings is a race-neutral reason supporting a strike. *United States v. Matthews*, 803 F.2d 325 (7th Cir. 1986) (juror arrived late, indicating a lack of commitment to the importance of the proceedings). Second, Jones is indeed related to Flowers. The relationship appeared to be through two different veins, albeit both through marriage. Both the State and Petitioner categorized that relationship differently with the trial court describing the relationship as follows:

> She said that Angela Ward Jones was married to Mark Jones, and she said that was her nephew. She's not directly related to Mr. Flowers. She's related by marriage to Mr. Flowers's [sic] sister. And then Hazel Jones is her husband's brother's wife and, you know, that's another family connection there.

Tr. 1789-90.

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[16] Petitioner also claims Evans provided "demonstrably false" testimony for "four of the five black panelists he struck." Pet. 51. However, as demonstrated *supra*, these other panelists, as well as Jones, were struck using valid race-neutral reasons, reasons which were not pretextual. Petitioner's false testimony claim and his *Batson* claim are devoid of legal merit.

A familial relationship to the Petitioner is certainly a race-neutral reason justifying a strike. *See Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013) (juror's familiarity with the defendant or his family is a race-neutral reason for a strike). Additionally, striking a venire member who knows a defendant or his family is a valid race-neutral reason justifying a peremptory strike. *See United States v. Lewis*, 593 F.3d 765, 770 (8th Cir. 2010) (prosecutor's reasoning that two jurors were struck because they personally knew a defense witness was a valid race-neutral reason); *United States v. Williamson*, 53 F.3d 1500, 1509-10 (10th Cir. 1995).

Third, Jones admitted to lying on her jury questionnaire. There, she indicated her strong opposition to the death penalty but during voir dire by the trial court, however, Jones testified that she had "an open mind," and that she "could consider both" sentencing options. Tr. 1362. The State investigated this clear discrepancy during voir dire:

Q: Okay. And I think on your questionnaire, you said you were strongly against the death penalty.

A: I guess I'd say anything to get off.

Q: Okay. Well, are you saying that you didn't tell the truth?

A: No, that's not that. It's just that if I didn't have to be here, I wouldn't want to be here.

> Q: Well, I want to know when you put down you were strongly against the death penalty—
>
> A: I was trying not to be—I—really and truly, I don't want to be here. I'll say it like that.

Tr. 1364.

Equivocation and lying are independent, valid race-neutral reasons justifying the strike of a member of the venire. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504 (1985)). In addition to prevarication, a juror's views on the death penalty are also valid race-neutral reasons supporting a strike.

At trial, Petitioner's counsel argued the State engaged in disparate treatment by striking Jones for lying on her questionnaire, but not striking Juror 51, Mr. Huggins, who initially stated that he had no knowledge of the Flowers case, but then later admitted to being in the 2007 voir dire panel. Tr. 1791. The trial court rejected Petitioner's argument, holding that Jones was the only juror, black or white, who admitted to lying to the court for the purpose of being struck from the venire:

> The court was somewhat dumbfounded—and this is the only juror of any race that made this statement. But she got up here from this

> witness stand and said, I lied on my questionnaire. And I think that, in and of itself, is a race neutral reason. She said, I lied. You know, I don't want to be here. And so I lied. And so, you know—I don't—she's totally been dishonest in something that she filed with this Court, and that is race neutral. There's not another person that has said, I lied on my questionnaire.

Tr. 1789.

Referring to Juror 51, whom the State did not strike, the trial court recognized that Huggins initially stated he had not been involved in the case, only to later volunteer that he had been in the venire panel in one of Flowers' previous trials. The obvious distinction in this instance is that the court recognized that Huggins never admitted to intentionally lying, as Jones had.[17] From this particular set of events, it is presumed that Huggins forgot or failed to understand the initial question. At any rate, Juror 51's response concerned his familiarity with the case and not with whether he

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[17] Defense counsel questioned Huggins about the fact that he had been summonsed as a juror for the Flowers case in 2008, and that he "sat through a similar process" but was excused because he was "so far down in the list" and wasn't needed. Tr. 1727. Counsel for Petitioner asked Huggins if he was mistaken when he told the trial court that the first time he'd heard anything about this was when he reported for the instant summons. Mr. Huggins responded, "Well, it happened in '96. I mean what I meant was since then I have heard a little off and on when I would come in, you know, into home." Tr. 1728.

was for or against the death penalty. Rejecting claims of disparate treatment, the trial court properly noted:

> Well, I have made my ruling, but I'll reiterate that she [Jones] said up here from this stand, "I lied on that questionnaire." I never did hear Mr. Huggins say he lied, and you didn't ask him. You know, you didn't ask him when he was called back in, did you lie when you said that? So I can't know his frame of mind of why he didn't originally point out he was in the original voir dire. But he clearly did not say that he lied. And again, the statement on the questionnaire [that she lied about was totally different] she said she could not under any circumstances consider the death penalty. And now she, in court, is saying that she can. That is vastly different. And also, again, these relationships she's got. I do not have any white juror that has been allowed to remain on that had those issues.

Tr. 1792.

The Mississippi Supreme Court's holding regarding the strike of Jones was clearly based on valid race-neutral reasons devoid of any pretext and was thus, not error, much less clear error. Flowers is entitled to no relief on this assignment of error.

### 5. Diane Copper

Finally, Petitioner claims error regarding venire member Diane Copper. However, the gist of Petitioner's claims with regard to Copper is his assertion that

District Attorney Evans, in voir dire, was "fishing" for "facially neutral pretext" and was "pushy" while questioning Copper regarding her work relationship with Flowers' sister. Pet. 46-47.

The State offered four race-neutral reasons for striking Copper, which the court below noted were that: "'1) she had worked with Flowers' father and sister; (2) she knew several members of the Flowers family; (3) she said she "leaned toward" Flowers' side of the case due to her relationships with the Flowers family; and (4) she knew several defense witnesses.'" J.A. 386. The Petitioner argued pretext, "asserting that the State had not challenged white jurors connected to people involved in the case." *Id.* Flowers also claimed the State did not attempt to rehabilitate Copper after "she said [sic] leaned toward Flowers." *Id.* The trial court, as the Mississippi Supreme Court noted, held the State's race-neutral reasons were valid, "concluding that Copper's relationships were distinguishable from those of the white jurors who were not challenged and recognizing that other jurors had not said they favored Flowers as Copper did." *Id.*

The record reflects that Copper worked with Flowers' father at Wal Mart, and with Flowers' sister at Shoe World. Tr. 1794. This was a sufficient race-neutral reason to strike her from the jury.[18] Additionally, while Copper stated she could be fair, she also testified that she would lean towards voting in favor of Flowers' family. Copper stated that "it's possible" the fact that she

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[18] *Higgins v. Cain*, 720 F.3d 255, 268 (5th Cir. 2013).

knew many of Flowers' family members could affect her and make her "lean toward [Petitioner]." Tr. 1404-06. The State asked Copper if those relationships would, "make it to where you couldn't come in here and, just with an open mind, decide the case, wouldn't it?" To which, Copper answered, "[c]orrect." Tr. 1407. Both Copper's preference for one side of the case and her equivocation between fairness and bias, were sufficient race-neutral reasons justifying a peremptory strike.

Additionally, Copper agreed with defense counsel's statement, "I get the impression you're saying that you'd rather not be a juror." Tr. 1409. Reluctance to serve is certainly a sufficiently race-neutral reason to lodge a peremptory challenge. Just as with Wright and Cunningham, Petitioner's trial counsel attempted to argue disparate treatment, yet conceded that none of the white jurors struck worked with a member of Flowers' family as Copper did. The trial court rejected Petitioner's claim of disparate treatment, holding:

> . . . she had stated that she worked with Archie at Wal-Mart, and she worked with Cora at Shoe World. She's had close working relationships with those two individuals in Mr. Flowers's [sic] family. I see that greatly different than No. 17, Ms. Chesteen, who was the bank teller and has people that's come into the bank. There's no indication that Ms. Chesteen has ever worked with Archie Flowers, ever worked with Cora or anybody else. And so there is a huge difference between the—

> S-6 with Ms. Copper and any white juror that was left on the panel.

Tr. 1796-97.

The trial court held there was a distinct difference between being acquainted or friendly with the victims, the Petitioner, or members of Flowers' family and working with the Petitioner's father and sister. Nearly all the jurors had some type of connection to the individuals involved in this case. Petitioner's claim of disparate treatment fails because the State accepted no juror, black or white, who worked with the victims, the Petitioner, or the parties' families.

Petitioner argued the State engaged in disparate treatment of Copper by accepting Jurors 40 and 50, each of whom stated that they had formed an opinion about the case, albeit undisclosed opinions, yet struck Copper without ever asking her if she could lay that aside. Tr. 1797. However, the record shows otherwise. Ms. Copper did indeed state that she could be fair, at first suggesting she could set aside her feelings. However, she equivocated stating she would lean toward Flowers' family. Such statements were not made by Jurors 40 and 50, as the trial court noted:

> Court: Well, the Court—neither No. 40 or No. 50 stated that they were leaning towards the Flowers' family in this case. And she did. There—there wasn't anything for them to rehabilitate because

> they didn't say they were leaning towards the Flowers family.
>
> * * *
>
> . . . . She said, "I would tend to lean toward favoring the family." And that—that is different than somebody that expresses no statement to that.

Tr. 1796-98.

Petitioner's *Batson* claim regarding this strike was properly adjudicated by the Mississippi Supreme Court, as the reasons offered by the State were race-neutral and were not the product of pretext. Additionally, there was no disparate treatment of Copper. The Mississippi Supreme Court's holding in this regard does not constitute clear error and complies with this Court's holding in *Batson*.

## CONCLUSION

The Mississippi Supreme Court reviewed the trial court's holding on the five challenged peremptory strikes and scrutinized the trial court's comparative analysis of the Petitioner's claims, and in so doing held the State's numerous and valid race-neutral reasons were not violative of *Batson* and were not pretextual. The record supports this holding.

None of the white jurors accepted by the State worked with a member of Flowers' family. None of the

white jurors accepted by the State were related, by blood or marriage, to Flowers. None of the white jurors accepted by the State equivocated on the death penalty. None of the white jurors accepted by the State admitted to lying in order to get off the jury. None of the white jurors accepted by the State lied about their opinion on the death penalty; none lied about their work relationship with a member of Flowers' family. None of the white jurors accepted by the State admitted to lying to the court. None of the white jurors accepted by the State had ever been sued by the victim's company. None of the white jurors accepted by the State were against the death penalty. The Petitioner failed to demonstrate purposeful discrimination at trial and on direct review with the Mississippi Supreme Court. He has likewise failed to satisfy his burden on this issue with this Court.

The State Respondent submits the holding of the Mississippi Supreme Court, that the State did not engage in purposeful racial discrimination during jury selection, and that Flowers' rights flowing from *Batson* were in no way violated, was not clearly erroneous. The Mississippi Supreme Court conducted its own painstaking analysis of the trial court's detailed findings and did not err in its application of *Batson* to this case. Petitioner's *Batson* claims must therefore fail.

For the above and foregoing reasons, the writ of certiorari should be dismissed in the instant case. The decision of the Mississippi Supreme Court concerning

Flowers' conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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No. 17-9572

# In The
# Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Mississippi**

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## TABLE OF CONTENTS

Page

ARGUMENT ..... 1

I. The State's brief mischaracterizes Flowers' positions and misrepresents the factual record ..... 1

II. Like the Mississippi Supreme Court below, the State has failed to engage with the most salient facts demonstrating Evans' intent to discriminate ..... 4

CONCLUSION ..... 7

## TABLE OF AUTHORITIES

CASES

*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... 1, 4, 7

*Miller-El v. Dretke*, 545 U.S. 231 (2005) ..... 2, 6

*Snyder v. Louisiana*, 552 U.S. 472 (2008) ..... 3

## ARGUMENT

### I. The State's brief mischaracterizes Flowers' positions and misrepresents the factual record.

The State repeatedly attributes to Flowers a position that he has explicitly disavowed. According to the State, Flowers asks this Court "to automatically assume the district attorney violated *Batson* [*v. Kentucky*, 476 U.S. 79 (1986),] based on his previous violation of *Batson* in Flowers' third trial. . . ." *See, e.g.*, Resp. Br. 21. Not so. Flowers' opening brief clearly states: "To be sure, Evans' past discrimination does not by itself prove either present discrimination or categorical unfitness to participate in jury selection, nor does it modify the allocation of the burden of proof at *Batson*'s third step." Pet. Br. 42.

The State accuses Flowers of "mischaracteriz[ing] the 'numbers' with regard to the prosecution's strikes as the district attorney struck five (5) of the available eighteen (18) African-American jurors remaining, as opposed to five (5) out of six (6), as the Petitioner suggests." Resp. Br. 17. Not so. Evans accepted one black panelist and struck the next five; then all twelve seats on the jury were filled before he *could* strike any more black panelists.[1] The presence of a dozen additional black panelists who were *qualified* for jury service is irrelevant because Evans had no opportunity to strike

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[1] *See* J.A. 208 (trial court states, "And I believe that gives us twelve, if I'm counting right.").

them. What matters is the five-out-of-six rate at which Evans struck black panelists presented to him.[2]

The State's brief supplements Evans' stated reasons for striking black panelists with arguments Evans did not provide. Resp. Br. 30 (arguing that one reason supporting the strike of black panelist Carolyn Wright was her questionnaire response that she served as a juror in a criminal case); Resp. Br. 38 (arguing that Edith Burnside's equivocation on whether she could impose the death penalty supported Evans' strike against her); Resp. Br. 42 (quoting the trial court's accurate description of Flancie Jones' distant familial connection to Flowers rather than Evans' false statement that Flowers was Jones' "nephew"). These hypothesized reasons—which the State fails to acknowledge are not Evans'—are irrelevant. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

The State purports to quote panelists when actually quoting Evans' characterizations of their responses. For the most part, these misleading attributions do not much matter; they only gild the lily.[3] However, the

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[2] Both the trial court and the Mississippi Supreme Court calculated the strike rate as Flowers has done, five out of six. J.A. 209; 372.

[3] For example, Dianne Copper did not, as the State claims, "state 'that she leaned toward favoring [Flowers'] side of the case.'" Resp. Br. 9-10. What she did say when asked if she thought "it may cause you to lean toward the defendant in the case" was "It's possible." J.A. 190. The State goes even further in its claim that Flancie Jones "was twice late to court, stating she didn't like

substitution of Evans' words for those of Edith Burnside is both disingenuous and significant. The State twice asserts that "Edith Burnside stated that Flowers was 'very good friends with both of her sons.'" Resp. Br. 9; 28. It claims that "Ms. Burnside stated the 'fact that she knew the Defendant so well, he had visited in her home, and was such close friends with her sons might affect her decision in this case.'" *Id.* The State's supporting J.A. citations are not to Burnside's *voir dire*, but to Evans' stated reasons for striking her. Burnside herself said that her sons and Flowers "played ball and stuff," and when asked whether that connection would affect her decision, she replied without qualification, "No." J.A. 80-81.

The State asserts that deference is due a trial court's demeanor determinations. Resp. Br. 13-14. But Flowers' trial judge made no determinations based upon demeanor. *Compare Snyder v. Louisiana*, 552 U.S. 472, 479 (2008):

> [D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a

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to get up in the morning." Resp. Br. 42 (citing Tr. 1786). It is true that Jones was late twice, but no one—not Jones, not Evans—"stat[ed] she didn't like to get up in the morning." Jones explained during *voir dire* that it was difficult for her to get up because she was coming off of the night shift, J.A. 180; Evans noted during the *Batson* hearing that "[s]he was late two different times," J.A. 229, but did not comment on Jones' explanation.

> determination concerning Mr. Brooks' demeanor.

Moreover, unlike Snyder's prosecutor, Evans made no assertions about demeanor, making it even less likely that the trial court's decision rested upon it.

## II. Like the Mississippi Supreme Court below, the State has failed to engage with the most salient facts demonstrating Evans' intent to discriminate.

The State credits the Mississippi Supreme Court for acknowledging that *Batson* "demands a sensitive inquiry into such circumstantial evidence of intent as may be available." Resp. Br. 24-25 (quoting J.A. 372). Then, like the state court below, it assiduously ignores both the existence and import of the most salient facts in the record.

With respect to Evans' history of striking 41 of 43 black panelists, and his two adjudicated *Batson* violations at prior trials, the State vaguely allows that history "is a circumstance to be considered," Resp. Br. 20, but never suggests what significance, if any, it should have. If the remainder of its brief is a guide, the State's answer (like the state courts') is "none." Apart from insisting that both state courts "clearly considered" it because Flowers' trial counsel *argued* it, *id.* at 20-21,[4] the

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[4] Flowers demonstrated at pp. 35-36 of his opening brief both that this logic simply does not hold, and that the record excerpts relied upon by the state court do not support the proposition for

State's only other use for Evans' history is as the subject of the straw man argument refuted *supra*. Evans' history makes its final appearance on p. 21 of the State's brief, then vanishes for good long before the State attempts to defend Evans' peremptory strikes—and his credibility—at Flowers' sixth trial.

The State observes that "[d]isparate treatment can certainly be a potential identifier of pretext," but dismisses the disparities here because Evans' "additional questions" to black panelists were merely legitimate follow-up to their "responses during *voir dire*." Resp. Br. 15; *see also id.* at 27 (repeating same claim). That does not begin to address the glaring differences in Evans' treatment of whites and blacks throughout the jury selection process. Evans posed far more questions to struck black panelists than to seated white panelists (a ratio of 29 to 1.1 on average, *see* Pet. Br. 15), thus ensuring there would be much more to pursue with the former group than with the latter.[5] He also

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which they were cited. The State's brief to this Court makes no attempt to refute either point.

[5] This vast disparity in questions posed to black and white panelists produced a record unusually resistant to characteristic-by-characteristic comparisons—the black panelists were examined in detail but the whites were not. Thus, while the State declares with anaphoric flair that "None of the white jurors" shared the litany of characteristics offered to justify striking the black panelists, Resp. Br. 50-51, that claim is dubious at best. Evans did not seek what he did not wish to find, and the conspicuous lopsidedness of the record he created across the length of jury selection is more probative of his real objective than it is of the actual qualifications of the black and white panelists he chose to strike or seat.

exhibited a telling mix of interests and aggressiveness: black panelists acquainted with defense witnesses were questioned extensively while whites with similar relationships were not, *id.* at 45; whites who admitted that they or a relative had been convicted of a crime (some by Evans' own office) were seated without probing, *id.* at 16; 52, while blacks were pursued at length—and later struck—over where they lived, whom they worked with, and whether they had been sued by Tardy Furniture over old credit accounts, *id.* at 46-48; and several black panelists were challenged with extrinsic evidence acquired through out-of-court investigations while no whites were subjected to such treatment, *id.* at 48; 50.

Finally, while the State at least pays lip service to Evans' history and questioning disparities, it says nothing at all about the additional indicators of discriminatory intent. As detailed in Flowers' opening brief, Evans' defense of his strikes featured multiple misrepresentations of the record facts. Pet. Br. 49-51. He also invoked purported concerns about panelists' fitness that were both implausible in the context of the case to be tried and impossible to credit in light of his indifference to other, objectively more serious sources of possible bias. *Id.* at 51-52.

Evans' tactics and behaviors at Flowers' sixth trial—especially when considered in light of the record he amassed in prior trials—"correlate with no fact as well as they correlate with race." *Miller-El*, 545 U.S. at 266. By choosing to ignore most of the indicators of Evans' real intent and refusing to consider them

cumulatively as *Batson* requires, the State does nothing to dissipate the powerful inference of racial motivation compelled by the totality of the record.

## CONCLUSION

For these additional reasons, petitioner Flowers respectfully requests that this Court reverse the decision of the Mississippi Supreme Court.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Mississippi**

## BRIEF OF FORMER JUSTICE DEPARTMENT OFFICIALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 5

I. Racial Discrimination In Jury Selection Undermines The Very Protections That A Jury Is Intended To Ensure. ..... 5

A. Since The Ratification Of The Fourteenth Amendment, The Court And Congress Have Understood Preventing Racial Discrimination In The Jury System To Be Critical To Providing Equality Under The Law ..... 5

B. To Give Full Effect To The Prohibition On Racial Discrimination In Jury Selection, Courts Must Rigorously Scrutinize Peremptory Challenges, Particularly Where There Is Evidence of Similar Prior Discrimination by the Same Prosecutor ..... 10

II. Racial Discrimination in Jury Selection Fundamentally Undermines Public Confidence in the Justice System ..... 14

A. Racial Discrimination in Jury Selection Harms Not Only

**TABLE OF CONTENTS**
**(continued)**

**Page**

Defendants, But The Justice System As A Whole ..... 14

B. *Amici*'s Experience in the Justice Department Has Convinced Us that Racial Discrimination and the Appearance of Racial Discrimination in the Jury System Undermine the Justice System ..... 18

CONCLUSION ..... 21

APPENDIX OF AMICI ..... 1a

# TABLE OF AUTHORITIES

**Page(s)**

**FEDERAL CASES**

*Akins v. Texas*,
325 U.S. 398 (1945) ..... 6

*Avery v. Georgia*,
345 U.S. 559 (1953) ..... 9

*Ballard v. United States*,
329 U.S. 187 (1946) ..... 15

*Batson v. Kentucky*,
476 U.S. 79 (1986) ..... passim

*Castaneda v. Partida*,
430 U.S. 482 (1977) ..... 9

*Duncan v. Louisiana*,
391 U.S. 145 (1968) ..... 5, 6

*Foster v. Chatman*,
136 S. Ct. 1737 (2016) ..... 4, 11, 14

*Georgia v. McCollum*,
505 U.S. 42 (1992) ..... 15, 16

*Hernandez v. Texas*,
347 U.S. 475 (1954) ..... 9

*Hollins v. Oklahoma*,
295 U.S. 394 (1935) ..... 9

*J.E.B. v. Alabama ex rel. T. B.*,
511 U.S. 127 (1994) ..... 15

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

*Miller-El v. Dretke*,
545 U.S. 231 (2005) ..... passim

*Neal v. Delaware*,
103 U.S. 370 (1880) ..... 9

*Pena-Rodriguez v. Colorado*,
137 S. Ct. 855 (2017) ..... passim

*Powers v. Ohio*,
499 U.S. 400 (1991) ..... 9, 15, 16

*Snyder v. Louisiana*,
552 U.S. 472 (2008) ..... 3, 11

*Strauder v. W. Virginia*,
100 U.S. 303 (1879) ..... passim

*Ex parte Virginia*,
100 U.S. 339 (1879) ..... 8

**STATE CASES**

*Flowers v. Mississippi*,
158 So.3d 1009 (2014) ..... 13

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240 So.3d 1082 (2017) ..... 13

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947 So.2d 910 (2007) ..... 4, 12

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(continued)

Page(s)

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*An Act for the further Security of equal Rights in the District of Columbia*, ch. 3, 16 Stat. 3 (Mar. 18, 1869) ..... 8

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Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985 (2000)) ..... 8

**FEDERAL RULES**

Rule 37.6 ..... 1

**OTHER AUTHORITIES**

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Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 4 Afr.-Am. L. & Policy Rep. 17 (Fall 1999) ..... 18

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are former officials in the United States Department of Justice, identified in the appendix, who maintain an active interest in the fair and effective functioning of the justice system. In particular, *amici* are deeply committed to maintaining the public trust in the justice system necessary to its effective administration, including the perception that all persons—and particularly criminal defendants—will be treated equally in the eyes of the law. *Amici* share the conviction that to foster this perception of equal treatment, all actors in the justice system must do their utmost to treat all persons fairly. It is also, of course, the right thing to do. And in cases where there is evidence that could cast doubt on whether a litigant has been treated fairly, *amici* believe is critical that courts take great care to examine this evidence and assure the public that the principle of fairness is upheld in practice.

This is particularly important in the context of peremptory challenges where racial bias is exploited, or seen to be exploited, by prosecutors, who are public servants charged with promoting fairness and justice, and whose conduct is thus particularly important in establishing public trust in the system. Without the perception of equal treatment for all participants in the legal system, the convictions of criminal defendants obtained by the Department of Justice—and in-

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[1] Counsel for all parties have consented to the filing of this brief. In accordance with Rule 37.6, *amici* confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

deed all outcomes in our justice system, whether in state or federal court—may lack legitimacy in the eyes of the public. A belief among the public that justice is not fair and evenhanded undermines both the mission of the Department of Justice and the rule of law itself.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The promise of "equal justice under law" is foundational to our justice system. Preventing racial discrimination in jury selection is essential to preserving both the principle of equal justice under law and public confidence that it is being upheld. In particular, this Court's precedent mandates, contrary to the decision below, that evidence of a prosecutor's prior history of racial discrimination is critical context that—in connection with evidence of discrimination intrinsic to the voir dire proceeding—is sufficient to provide an "undeniable explanation" that the prosecutor's proffered reasons for striking African American jurors are pretext. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005).

I. As this Court first recognized in 1879, just after the Fourteenth Amendment was ratified, prohibiting African-Americans from serving on a jury undermines the very protections a jury system is intended to provide. *Strauder v. W. Virginia*, 100 U.S. 303, 308 (1879). Such discrimination denies a fair trial to the accused by depriving him of a jury that is fairly representative of his own community. And it denies justice to crime victims who happen to be members of disfavored minorities. For those reasons, the Court held that the prohibition on racial discrimination in

jury selection is at the core of the Fourteenth Amendment.

This Court has repeatedly reaffirmed that bedrock principle in the nearly 140 years since. In particular, this Court has recognized that racial discrimination in the context of peremptory challenges, while more subtle than the discriminatory state statute struck down in *Strauder*, is just as inimical to the right to a fair trial by a jury of one's peers. *Batson v. Kentucky*, 476 U.S. 79 (1986). Because discriminatory peremptory challenges are difficult to detect and prevent, this Court has made clear that courts must evaluate such claims in light of "all of the circumstances that bear upon the issue of racial animosity." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

In its post-*Batson* jurisprudence, this Court has held that the prosecution's prior pattern of racial discrimination is powerful evidence that peremptory strikes of African American jurors in a particular case may be discriminatory. *Miller-El*, 545 U.S. at 253, 266. That evidence is present here, and the lower courts should have considered it. Since 1996, petitioner has been tried six times by the same District Attorney in connection with a multiple homicide in Winona, Mississippi. In the five trials for which information about the race of jurors struck by the prosecution is available, the prosecutor used peremptory challenges on all but one potential African American juror, a total of 41 potential African American jurors in all. *See* Pet. Br. 2, 32. Over the course of the six trials, the Mississippi courts twice held that the prosecutor had violated *Batson*, in two different trials. The Mississippi Supreme Court described the evidence as "as strong a prima facie case of racial dis-

crimination as [it] ha[d] ever seen" in this context. *Flowers v. Mississippi*, 947 So.2d 910, 935 (2007); *see* Pet. Br. 9. Under *Miller-El*, this history of adjudicated racial discrimination in peremptory challenges is critically relevant to evaluating whether the prosecutor again discriminated in the jury selection procedure at issue here.

II. In case after case, this Court has recognized that the necessity of protecting the jury system from racial discrimination is "essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends." *Foster v. Chatman*, 136 S. Ct. 1737, 1760 (2016) (Alito, J., concurring); *see also Miller-El*, 545 U.S. at 238 ("[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality' and undermines public confidence in adjudication." (citations omitted)). As this Court has repeatedly and consistently articulated, the use of peremptory challenges to effectuate racial discrimination is uniquely pernicious to public confidence in the integrity of the judicial system (i) because it undermines the bedrock guarantee of fairness that the jury system is intended to provide; (ii) because of the long history in which it has been used to tip the scales of justice; (iii) because when it occurs, it undermines confidence in the outcomes of the justice system; and (iv) because excluding individuals from jury service based on immutable characteristics is fundamentally inconsistent with our pluralistic, democratic society.

As former Justice Department officials, we understand from firsthand experience the critical importance of evenhandedly administering the justice

system, and of public confidence in the integrity of the justice system. Law enforcement simply cannot function without public legitimacy. When prosecutors discriminate in jury selection, they violate their oath to do justice and undermine the criminal justice system as a whole.

## ARGUMENT

### I. Racial Discrimination In Jury Selection Undermines The Very Protections That A Jury Is Intended To Ensure.

#### A. Since The Ratification Of The Fourteenth Amendment, The Court And Congress Have Understood Preventing Racial Discrimination In The Jury System To Be Critical To Providing Equality Under The Law

1. Since the Founding, the right to trial by jury has been "considered a fundamental safeguard of individual liberty." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017); *see The Federalist No. 83*, at 451 (A. Hamilton) (B. Warner ed. 1818). The Framers, like the "founders of the English law" in which the jury trial right originated, understood that the jury would provide critical protection against "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155-156 n.23 (1968) In particular, the jury was intended to guard against "unfounded criminal charges brought to eliminate enemies" and other arbitrary misuses of the criminal justice system. *Id.* at 156.

The jury's ability to safeguard liberty is founded on its composition. *Strauder v. W. Virginia*, 100 U.S.

303, 308 (1879) ("the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure"). Juries are thought to ensure defendants a fair trial precisely *because* they are composed of "the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Ibid*. When the truth of the prosecutor's accusations against a defendant must be "'confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion,'" the defendant and the community can be confident that the conviction is not simply the result of "overzealous" or "biased" government action. *Duncan*, 391 U.S. at 151-152 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 349-350 (Cooley ed. 1899)).

But just as a representative jury of one's peers serves as a powerful check on government oppression, an unrepresentative jury can be an equally powerful instrument of that very oppression. Juries determine in the first instance "the way in which law should be enforced and justice administered" with respect to individual defendants. *Duncan*, 391 U.S. at 155. When particular communities or minority groups are excluded from jury selection, there is a danger that instead of serving as a check on arbitrary government action, the jury will simply reinforce it. "By compromising the representative quality of the jury, discriminatory selection procedures make juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." *Batson v. Kentucky*, 476 U.S. 79, 86-87 n.8 (1986) (quoting *Akins v. Texas*, 325 U.S.

398, 408 (1945) (Murphy, J., dissenting)). A jury composed of representative members of the community, "indifferently chosen," is thus critical to ensuring the equal protection of the laws to both defendants and crime victims. *Strauder*, 100 U.S. at 308.

2. The framers of the Fourteenth Amendment well understood that eliminating racial discrimination in jury selection was critical to ensuring African Americans' civil and legal equality.

The debates preceding the ratification of both the Thirteenth and Fourteenth Amendments were influenced by arguments that participation on juries was necessary to ensure that African Americans would enjoy equal protection of the law—both the protection that the law provides against crime (in particular, the lynchings and other racially motivated violence that followed the end of the Civil War), and the protection of a fair trial when accused of a crime. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 916-917 (2004). As this Court has recounted, "[i]n the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). Particularly in the South, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites, including Ku Klux Klan members, against blacks and Republicans." *Ibid.* (quoting Forman, *supra*).

Both Congress and this Court responded with measures designed to ensure that juries would be im-

partial and selected free of racial discrimination. In 1869, Congress exercised its plenary authority over the District of Columbia to prohibit racial limitations on jury service, as well as the right to hold offices. *An Act for the further Security of equal Rights in the District of Columbia*, ch. 3, 16 Stat. 3 (Mar. 18, 1869). In 1871, using its authority under the Fourteenth Amendment, Congress enacted the Ku Klux Klan Act, which rendered persons who had conspired to deny the civil rights of African Americans ineligible to sit on juries. Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, §5, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1985 (2000)). And in 1875, Congress banned racial discrimination in jury service in state courts in Section 4 of the Civil Rights Act of 1875. Civil Rights Act of 1875, ch. 114, §4, 18 Stat. 335, 336-337; *see Ex parte Virginia*, 100 U.S. 339 (1879). These statutes, all enacted in the years immediately after the Fourteenth Amendment's ratification, demonstrate that the import of a jury system free from racial discrimination was well understood at the time.

This Court first held that the Fourteenth Amendment prohibits racial discrimination in jury selection in 1879, striking down a West Virginia statute that disallowed African-Americans from serving on juries. *Strauder*, 100 U.S. at 308. The Court explained that racial discrimination in jury selection denies African Americans "a very essential part of the protection such a mode of trial is intended to secure," as it exposed African-American defendants to the danger that their cases would be tried by racially prejudiced juries. *Id.* The Court viewed the proposition that racial discrimination in the jury system denied the equal protection of the laws promised by the Fourteenth Amendment as self-evident: "how can it be

maintained that compelling [an African American] to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded [everyone] of his race, because of color alone . . . is not a denial to him of equal protection?" *Id.* at 309.

In the nearly 140 years since, "this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct." *Powers v. Ohio*, 499 U.S. 400, 404 (1991); *see also Pena-Rodriguez*, 137 S. Ct. at 867. The Court has repeatedly struck down laws and policies that systematically exclude minorities from juries. *See, e.g., Neal v. Delaware*, 103 U.S. 370 (1880) (practice of excluding African Americans as unqualified on other grounds); *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (per curiam); *Avery v. Georgia*, 345 U.S. 559 (1953) (use of differently colored tickets to ensure that only the names of white individuals would be selected to serve on a jury); *Hernandez v. Texas*, 347 U.S. 475 (1954) (practice of excluding persons of Mexican descent); *Castaneda v. Partida*, 430 U.S. 482 (1977) (same, in grand jury selection).

### B. To Give Full Effect To The Prohibition On Racial Discrimination In Jury Selection, Courts Must Rigorously Scrutinize Peremptory Challenges, Particularly Where There Is Evidence of Similar Prior Discrimination by the Same Prosecutor

In *Batson v. Kentucky*, this Court addressed the problem of discriminatory peremptory challenges, holding that "there can be no dispute[] that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." 476 U.S. 79, 96 (1986) (citation omitted).

In the late nineteenth and twentieth centuries, after the Court had struck down statutes or policies excluding racial minorities from juries, "[s]tate officials then turned to somewhat more subtle ways of keeping blacks off jury venires." *Id.* at 103 (Marshall, J., concurring). Because prosecutors enjoyed a "historical privilege of peremptory challenge free of judicial control," *id.* at 91, peremptory challenges provided a ready means of ensuring an all-white or nearly all-white jury. "Misuse of the peremptory challenge to exclude black jurors" therefore became "both common and flagrant." *Id.* at 103-104 (Marshall, J., concurring) (describing an "instruction book used by the prosecutor's office in Dallas County, Texas" that "explicitly advised prosecutors that they conduct jury selection so as to eliminate 'any member of a minority group,'" as well as statistics showing disproportionate use of peremptory challenges to strike black jurors). The Court accordingly held that peremptory challenges are subject to equal protection principles, and

that when a defendant establishes that a prosecutor used peremptory challenges to exclude minority jurors, his conviction must be reversed. *Id.* at 100.

In recent decades, the Court has made clear that trial judges must be vigilant in "ferreting out" the misuse of peremptory challenges to mask racial discrimination in jury selection. *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). Because discriminatory intent can easily be obscured by the many discretionary factors that could legitimately influence peremptory challenges, it is critical that the trial court consider "all requisite circumstances" in determining whether a defendant has established intentional discrimination in the use of peremptory challenges. *Id.* at 240 (quoting *Batson*, 476 U.S. at 96); *see also Foster v. Chatman*, 136 S. Ct. 1737, 1748 (2016) ("We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.'") (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)).

The relevant circumstances that must be considered include both evidence intrinsic to the voir dire proceeding and evidence that is extrinsic to the proceeding. Thus, the prosecutor's conduct during jury selection is relevant: for instance, the number and percent of African American jurors stricken by the prosecution, a comparison of African American jurors stricken from the panel and white jurors permitted to serve, and any other conduct during the jury selection procedure. Extrinsic evidence is also relevant: in particular, the prosecution's policies and practices of discrimination outside the specific set of jurors under consideration in the given trial. *Miller-El*, 545 U.S.

at 240-41, 253-55, 265.

In *Miller-El*, for instance, the Court gave great weight to the "widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id.* at 253. The Court explained that "[i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much . . . ." *Id.* at 240. "[S]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure [that purposeful discrimination occurred] unless it looks beyond the case at hand." *Id.* at 240, 253. Thus, a prosecutor's history of racially discriminatory strikes in or around the time of the relevant case provides critical context in assessing a prosecutor's proffered neutral reasons for peremptorily striking minority jurors.

That context is unquestionably present here. In Petitioner's first two trials, the prosecutor struck all but one potential African-American juror, and that juror was seated only because the trial judge concluded that the peremptory strike was racially motivated. Pet. 3. In the third trial, the prosecutor used all 15 peremptory strikes against African-Americans, leading the Mississippi Supreme Court, in overturning the conviction, to comment that "[t]he instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers v. Mississippi*, 947 So.2d 910, 935 (2007) ("The prosecutor exercised all fifteen of his peremptory strikes on African–Americans, and the lone African–American who ulti-

mately sat on Flowers' jury was seated after the State ran out of peremptory challenges. Such a result cannot be considered 'happenstance.'"). After two subsequent trials before racially mixed juries ended in mistrials, the prosecutor struck five of six potential African American jurors in the trial at issue here, resulting in a jury of 11 whites and one African American. To be sure, the history of racially motivated peremptory challenges by the prosecutor in prosecuting petitioner's case does not in itself establish that the challenges under review here were discriminatory. But the prosecutor's historical practice is unquestionably relevant to that question, and the Mississippi Supreme Court was wrong to disregard it.[2]

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[2] In its initial opinion affirming Mr. Flowers' conviction after his sixth trial, the Mississippi Supreme Court wholly failed to consider the history of prior *Batson* violations by the same prosecutor in Mr. Flowers' case. *See Flowers v. Mississippi*, 158 So.3d 1009 (2014). After this Court vacated that decision for further consideration in light of *Foster v. Chatman*, the Mississippi Supreme Court re-adopted its same analysis, dismissing the evidence of prior *Batson* violations with the conclusory assertion that it "does not alter [its] analysis." *Flowers v. Mississippi*, 240 So.3d 1082, 1124 (2017). The Mississippi Supreme Court's failure to meaningfully consider the totality of the circumstances is plainly contrary to this Court's decision in *Miller-El*. *See* Pet. Br. 21-23, 33-39.

## II. Racial Discrimination in Jury Selection Fundamentally Undermines Public Confidence in the Justice System

### A. Racial Discrimination in Jury Selection Harms Not Only Defendants, But The Justice System As A Whole

1. There is no question that racial discrimination in jury selection impedes individual defendants' right to a fair trial. But the Court has also long recognized that prohibiting such discrimination "is essential to ... preserve the public confidence upon which our system of criminal justice depends." *Foster*, 136 S. Ct. at 1760 (Alito, J. concurring). Racial bias in the jury system threatens "systemic injury to the administration of justice" because it is a "recurring" problem that "implicates unique historical, constitutional, and institutional concerns." *Pena-Rodriguez*, 137 S. Ct. at 868.

First, a fairly constituted jury, representative of the defendant's community, is the very characteristic that enables a jury to perform its constitutional function of ensuring a fair trial. *See supra* Part I.A.

Second, precisely because of the power of jury composition, prosecutors historically have used racial discrimination in jury selection to administer the criminal justice system in a fundamentally unfair way. All-white juries have been used both to exonerate white defendants accused of racially motivated crimes against African Americans and to convict innocent African Americans of crimes they did not commit. *Pena-Rodriguez*, 137 S. Ct. at 868; *see, e.g.*, James Foreman, Jr., *Juries and Race in the Nine-*

*teenth Century*, 113 Yale L.J. 895 (2004). That history demonstrates the close connection between jury selection and the justice system's outcomes, and creates both a special sensitivity and a special need for vigilance on this issue.

Third, because of this history, discrimination in jury selection undermines public acceptance that justice is being done. "One of the goals of our jury system is 'to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.'" *Georgia v. McCollum*, 505 U.S. 42, 49 (1992) (quoting *Powers v. Ohio*, 499 U.S. 400, 413, (1991)). Thus, "[t]he verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset." *Powers*, 499 U.S. at 413.

Finally, representative juries serve a broader public purpose by demonstrating that all of the communities and individuals within "the heterogeneous population of our Nation" are viewed as qualified to take part in the administration of criminal justice. *Batson*, 476 U.S. at 99. "[T]he admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection . . . deprives the jury system of the broad base it was designed by Congress to have in our democratic society," *Ballard v. United States*, 329 U.S. 187, 195 (1946), and establishes "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994). Discrimination in jury selection thus creates a divide between those empowered to take part in the criminal justice system through jury service, and

those who are viewed as unqualified to do so—but who are governed by that very system. That is intolerable in our democratic, pluralistic society.

Juries tainted by racial bias are therefore harmful not only to the defendant or the jurors, but also to the "entire community," because they "undermine public confidence in the fairness of our system of justice" as a whole. *Batson*, 476 U.S. at 87. "Selection procedures that purposefully exclude African–Americans from juries undermine that public confidence—as well they should. 'The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.'" *McCollum*, 505 U.S. at 49 (quoting *Powers*, 499 U.S. at 412). For this reason, this Court has repeatedly recognized that "[a] constitutional rule that racial bias in the justice system must be addressed . . . is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Pena-Rodriguez*, 137 S. Ct. at 869; *see also Powers*, 499 U.S. at 411 (discriminating racially in jury selection "damages both the fact and the perception" that juries can guard against wrongful exercise of state power).

2. These concerns about public confidence in the judicial system are particularly pressing because empirical research confirms that many Americans question the system's fairness. For example, a 1999 survey conducted by the American Bar Association revealed that nearly half of the Americans surveyed indicated that the U.S. judicial system does not provide equal justice for African Americans. *See* Mattie Johnstone & Joshua M. Zachariah, *Peremptory Chal-*

*lenges and Racial Discrimination: The Effects of Miller-El v. Cockrell*, 17 Geo. J. Legal Ethics 863, 863 n.1 (2004); Emily Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, ch. 3, Perceptions of Systemic Racial Bias, Cato Institute (December 7, 2016) ("Fully 58% of Americans say the criminal justice system fails to treat all individuals equally, including 45% who believe the system gives preference to white Americans....").[3] A majority of African Americans themselves—68% in a recent study—perceive the justice system as treating African Americans unequally. *See, e.g.*, Monica Anderson, *Vast Majority of Blacks View the Criminal Justice System as Unfair*, Pew Research Center (Aug. 12, 2014).[4] Similarly, a survey conducted at the request of the Georgia Supreme Court indicated that "African-Americans and Hispanics were much more likely to indicate that people like themselves received 'somewhat worse' or 'far worse' treatment by the courts," with "[t]he level of disappointment with treatment by the courts among African-American Georgians" particularly strong. George W. Dougherty, et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and Its Progeny*, 37 Ga. L. Rev. 1021, 1028 (Spr. 2003).[5]

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[3] https://www.cato.org/policing-in-america/chapter-3/perceptions-systemic-racial-bias.

[4] http://www.pewresearch.org/fact-tank/2014/08/12/vast-majority-of-blacks-view-the-criminal-justice-system-as-unfair/.

[5] The authors of the Georgia study found, however, that African Americans who had served on juries had better perceptions of the court system than those who had not, suggesting that inclusion in jury service fosters public perceptions of fairness. *Id.* at 1033-34.

The public response in the aftermath of certain widely-reported cases also provides more dramatic evidence that jury composition can affect the public's perception of the fairness of verdicts in racially charged cases. Popular anger and unrest has followed acquittals of white police officers by all-white juries for beating or killing African American motorists in Los Angeles in the Rodney King case, and in Miami in a series of cases in the 1980s. *See, e.g.*, Hiroshi Fukurai, *Social De-Construction of Race and Affirmative Action in Jury Selection*, 4 Afr.-Am. L. & Policy Rep. 17, 18-19, 23 (Fall 1999). But a subsequent acquittal of a white police officer in a similar case in Miami by a racially diverse jury did not spark protests.[6] *Id.* at 19.

### B. *Amici*'s Experience in the Justice Department Has Convinced Us that Racial Discrimination and the Appearance of Racial Discrimination in the Jury System Undermine the Justice System

As former officials in the Department of Justice, we witnessed firsthand that public confidence in the integrity of the jury system is essential to the system's operation as a whole. The vital work of law enforcement professionals—from police investigators to prosecutors and policymakers—depends on belief in

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[6] In a widely-celebrated example from Mississippi of how a jury composed without racial discrimination can improve confidence in the justice system, the 1994 conviction by a racially diverse jury of Byron de la Beckwith of killing civil rights activist Medgar Evers came exactly 30 years after two all-white juries refused to convict Beckwith for the same crime, despite his having publicly bragged about perpetrating it. *See, e.g., id.* at 18.

the fairness of the justice system's procedures and the evenhandedness of its operation. Without that legitimacy, the public will be less likely to cooperate with law enforcement and to accept the accuracy and fairness of criminal verdicts. *Cf. Miller-El*, 545 U.S. at 238 ("[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication.") (internal quotation marks and citations omitted).

It is therefore critical that those administering the justice system uphold the promise of equal justice under law, and also that they be perceived as doing so. Prosecutors in particular must honor the principle that "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict," and they must at all times "respect the constitutional and legal rights of all persons, including suspects and defendants." ABA, Criminal Justice Standards for the Prosecution Function 3-1.2(b) (4th Ed.). In our tenure in the Department, we were privileged to work with dedicated professionals who upheld these standards and acted with the highest integrity.

But when there is reason to believe that a prosecutor is exploiting racial bias and division in an attempt to obtain a conviction, the courts must take strong action. That the bias is exploited by, or seen to be exploited by, prosecutors—public servants who have been charged with promoting fairness and justice—makes this type of discrimination especially damaging to acceptance of the rule of law. Left unaddressed, discrimination in jury selection threatens to leave the public with the belief that it is governed

by men, not laws. Requiring all prosecutors comply with *Batson* is necessary "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Pena-Rodriguez*, 137 S. Ct. at 868. The Mississippi Supreme Court's cavalier disregard of the history in this case—in which the prosecutor was twice adjudicated to have violated *Batson* in his previous attempts to secure a conviction of this very defendant—cannot be squared with this critical principle.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner's brief, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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No. 17-9572

IN THE

# Supreme Court of the United States

CURTIS GIOVANNI FLOWERS,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

**On Writ of Certiorari to the Mississippi Supreme Court**

## BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER


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## TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... iii

INTERESTS OF AMICUS CURIAE ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. THE RIGHTS TO SERVE ON—AND BE TRIED BY—AN IMPARTIAL, FAIRLY CONSTITUTED JURY, ARE INTEGRAL TO FULL AMERICAN CITIZENSHIP ..... 3

II. THROUGH DETERMINED EVASION, RECALCITRANT STATES HAVE SUBORDINATED THE RIGHTS TO SERVE ON AND BE TRIED BY FAIRLY CONSTITUTED JURIES TO ANTI-BLACK DISCRIMINATION. ..... 6

A. Reconstruction's Collapse Engendered Immediate Denial of the Jury-Trial Right. ..... 7

B. The States Innovated to Elude This Court's Decisions Combatting Post-Reconstruction Jury-Service Suppression. ..... 10

C. Jury Discrimination Remains Common After *Batson*. ..... 13

TABLE OF CONTENTS
(CONTINUED)

PAGE

III. WINONA AND THE FIFTH JUDICIAL DISTRICT HAVE A LONG HISTORY OF DENYING AFRICAN AMERICANS EQUAL RIGHTS. ..... 17

IV. DOUG EVANS HAS A HISTORY OF DISCRIMINATING AGAINST AFRICAN AMERICAN JURORS, AND THAT PATTERN OF DISCRIMINATION HAS PERSISTED THROUGHOUT MR. FLOWERS' TRIALS. ..... 30

A. Mr. Evans' Office Strikes African American Jurors at a Much Higher Rate Than White Jurors. ..... 30

B. Doug Evans' Actions Throughout the Six Curtis Flowers Trials Reveal an Intent to Remove as Many African-American Jurors as Possible. ..... 31

CONCLUSION ..... 37

## TABLE OF AUTHORITIES

**PAGE(S)**

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325 U.S. 398 (1945) ..... 11

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405 U.S. 625 (1972) ..... 1

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542 U.S. 296 (2004) ..... 4

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500 U.S. 614 (1991) ..... 1

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158 So. 3d 1009 (Miss. 2014) ..... 35

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438 F. Supp. 390 (N.D. Miss. 1977) .....25

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294 U.S. 587 (1935).....10, 11, 16

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## INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. We represented the defendants in, *inter alia*, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination, *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as amicus curiae in *Batson v. Kentucky*, 476 U.S. 79 (1986), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Johnson v. California*, 545 U.S. 162 (2005), and *Miller-El v. Dretke*, 545 U.S. 231 (2005).[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The right to serve on, and be tried by, an impartial jury constituted in a nondiscriminatory manner is as integral to full participation in our democracy as the right to vote. For precisely that reason, those who seek to deny full citizenship to African Americans have always sought to deny this right. Since *Strauder v. West Virginia* in 1880, this Court has been clear that discriminatory jury practices violate the Constitution. But the devil has been in the details. Since *Strauder*—and to this day—recalcitrant state and local officials have worked assiduously to evade this Court's mandates.

The racially motivated use of peremptory strikes is one discriminatory tactic that has been particularly difficult to root out. In *Batson v. Kentucky*, this Court recognized that its past efforts in the field had been inadequate and attempted to implement a more meaningful remedy. Thirty-two years later, the state of play is clear: without robust, searching judicial review of prosecutors' ostensibly neutral reasons for strikes, *Batson*'s promise will remain unkept.

The history of racial discrimination in Mississippi's Fifth Judicial District and Doug Evans' record of discriminatory conduct highlight both the depth of the problem and the need for searching judicial review of peremptory challenges. White residents of the Fifth Judicial District have employed various means since the Civil War to deny African Americans full citizenship: lynching, Jim Crow, mob violence, economic coercion, and the denial of voting and jury-service rights. Local officials have permitted this discrimination at best and directed it at worst.

Doug Evans' tenure as District Attorney is but the latest chapter in this history of discrimination. Mr. Evans has an unprecedented track record of discriminatory jury selection. Over the course of his twenty-five years in office, Mr. Evans has used peremptory challenges on African American jurors at 4.4 times the rate of white jurors. Mr. Evans has also taken multiple actions—prosecuting an African American juror who refused to vote for Mr. Flowers' conviction, lobbying local legislators to pass laws that would make it easier to avoid seating African American jurors in this case, and speaking on multiple occasions to a white supremacist group—that demand heightened scrutiny of his peremptory strikes in Mr. Flowers' case.

Mr. Evans' pattern of discrimination confirms what is clear from the transcript of Mr. Flowers' trial: the prosecution unconstitutionally discriminated against African Americans in jury selection.

## ARGUMENT

### I. THE RIGHTS TO SERVE ON—AND BE TRIED BY—AN IMPARTIAL, FAIRLY CONSTITUTED JURY, ARE INTEGRAL TO FULL AMERICAN CITIZENSHIP.

The right to trial by an impartial jury is "justly dear to the American people . . . and every encroachment upon it has been watched with great jealousy." *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 446 (1830) (Story, J.). At a contentious Constitutional Convention, one of the few uncontroversial points was the importance of the right to trial by jury in criminal cases. *See, e.g.*, Federalist No. 83 (Hamilton). And the criminal-trial

jury receives three separate mentions in the Constitution's main text and the Bill of Rights. *See* U.S. Const. art. III. § 2; U.S. Const. amend. V; U.S. Const. amend. VI. Blackstone, "the most satisfactory exposito[r] of the common law of England," *Schick v. United States*, 195 U.S. 65, 69 (1904), saved his highest praise for the right. He considered the power to demand "the unanimous consent of twelve of his neighbours and equals" before any deprivation of liberty to be "the most transcendent privilege" and the "glory of the English law." 3 William Blackstone, *Commentaries on the Laws of England* 379 (Phila., J.B. Lippincott Co., 1893); *see also Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1880) (referencing Blackstone).

The Founders understood that a robust jury-trial right is indispensable to a government that claims to derive its "just powers from the consent of the governed." The Declaration of Independence para. 2. "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary[.]" *Blakely v. Washington*, 542 U.S. 296, 306 (2004). At its best, this quintessentially democratic institution is a critical bulwark "against the arbitrary exercise of power[,]" *Batson v. Kentucky*, 476 U.S. 79, 86 (1986), that "guards the rights of the parties" and "ensures continued acceptance of the laws by all of the people[.]" *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

Because the jury helps sustain our democracy, nondiscriminatory access to this institution is no less a part of full citizenship than suffrage. *See, e.g.*, *id.* at 407 ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most

significant opportunity to participate in the democratic process."). The jury does not just protect the defendant: it "preserves in the hands of the people that share which they ought to have in the administration of public justice." 3 Blackstone, *supra*, at 380. As De Tocqueville recognized, it "places the real direction of society in the hands of the governed" and "invests the people . . . with the direction of society."[2] That means illegitimate jury composition harms not just the accused, but "the "law as an institution," the "community at large," and "'the democratic ideal reflected in the processes of our courts.'" *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (citation omitted). Accordingly, this Court's cases recognize and protect the rights of "potential jurors" as much as defendants, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128 (1994). Persons "excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 329 (1970).

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[2] Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 Vand. L. Rev. 1099, 1157 (2014) (quoting Alexis de Tocqueville, *Democracy in America* 293–94 (Philip Bradley ed., Vintage Books 1945) (1835)).

## II. THROUGH DETERMINED EVASION, RECALCITRANT STATES HAVE SUBORDINATED THE RIGHTS TO SERVE ON AND BE TRIED BY FAIRLY CONSTITUTED JURIES TO ANTI-BLACK DISCRIMINATION.

African Americans have historically been excluded from the rights and privileges associated with full personhood in this country. The right to a jury trial—and to participate as a juror—is no exception. Of course, enslaved Black persons were deprived of the rights of citizenship. But even in the "free" Northern states, it appears that no African Americans served on a jury before two served in Massachusetts in 1860.[3] It took a Civil War and three Reconstruction Amendments to defeat the claim that African Americans could not be full citizens of this country. *See McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring).

Since the Civil Rights Act of 1875, it has been a crime to discriminate in the jury selection process. *See* Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336–37 (codified as amended at 18 U.S.C. § 243). And since 1880, it has been clear that the racial exclusion of jurors violates the Fourteenth Amendment. *See Batson*, 476 U.S. at 85 (citing *Strauder*). But in the 150 years since the Fourteenth Amendment's enactment, the battle against discrimination in the jury selection process has resembled nothing so much as Hercules' battle against the many-headed Hydra. Blackstone warned of "secret machinations" to erode

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[3] *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 884 (1994).

the right to trial by a jury "indifferently chosen[,]" 4 William Blackstone, *Commentaries on the Laws of England* 350 (Phila., J.B. Lippincott Co., 1893). But our history is replete with as many open machinations as secret ones.

### A. Reconstruction's Collapse Engendered Immediate Denial of the Jury-Trial Right.

Even at the height of the federal government's attempt to protect the rights of the freedmen during Reconstruction, some jurisdictions managed to avoid seating African American jurors.[4] Initially, the judicial branch pushed back. In 1880, *Strauder* invalidated West Virginia's explicitly discriminatory state statute. *See* 103 U.S. at 305, 310, 312. And the next year, *Neal v. Delaware* vacated a conviction where—despite a facially neutral jury-selection statute—African Americans had been "uniform[ly] exclu[ded]" from jury service in the state. 103 U.S. 370, 389–90 394, 396–97 (1881). But the Court issued those decisions as Reconstruction ground to a halt, and the states of the former Confederacy seized the opportunity to devise new ways to suppress jury-service and jury-trial rights as they simultaneously suppressed the right to vote. *See, e.g., Batson*, 476 U.S. at 103 (Marshall, J, concurring).

Mississippi was an innovator in both realms.[5] Its concurrent attacks on jury and voting rights are evidenced in *Williams v. Mississippi*, 170 U.S. 213

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[4] *Id.* at 887.

[5] *See* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 Miss. L.J. 591, 602–07 (1987).

(1898), which concerned a challenge to a murder conviction obtained after indictment by an all-white jury. *See id.* at 213–14 (syllabus). The drafters of Mississippi's 1890 constitution wished "to obstruct the exercise of the franchise" by African Americans "within the field of permissible action" under the federal constitution. *Id.* at 222 (quoting *Ratcliff v. Beale*, 20 So. 865, 868 (Miss. 1896)). The drafters also wanted to prevent African Americans from serving on juries. They accomplished both goals by vesting discretion in registrars regarding eligibility to vote, pegging eligibility for jury service to that determination, and then providing by statute that selected jurors be of "good intelligence, sound judgment, and fair character. *Id.* at 217 n.1 (syllabus), 220–23. For both voting and jury-service rights, registrars exercised that discretion in a predictable, discriminatory way. Nevertheless, this Court failed to invalidate this suppressive tactic, reasoning that the law "reach[ed] weak and vicious white men as well as weak and vicious black men" and demanding difficult-to-obtain evidence regarding "how or by what means" the scheme actually worked in a discriminatory manner. *Id.* at 222–23. *Williams* unleashed a flood of copycats as states scrambled to employ similar means to disfranchise African Americans and deny them the right to serve on juries.[6]

The recalcitrant states desired all-white juries for the same reason they wanted an all-white electorate: "the perpetuation of white supremacy within the legal

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[6] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 77–78 (1990).

system depended substantially on the preservation of all-white juries."[7] Their goal was to "punish[] black defendants particularly harshly, while simultaneously refusing to punish violence by whites . . . against blacks and Republicans." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017). They succeeded. During this period of largely unchecked race-based terrorism in the South, *see id.*, "all-white juries" repeatedly "acquitted or failed to indict whites suspected of killing blacks."[8] Conversely, for Black defendants, all-white juries reliably convicted on petty-crime charges, guaranteeing continued economic exploitation.[9] And, in cases where Black defendants escaped lynching, all-white juries in capital cases ensured that they met death with a patina of legality.[10] Without federal judicial, executive, or legislative support, jury-service and jury-trial rights were effectively eliminated for African Americans.

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[7] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 62 (2000); *see also* Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1595 (2018).

[8] James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L. J. 895, 918, 931 (2004); *see also id.* at 931–33; Colbert, *supra* note 6, at 79 & n.396, 86–87; *cf. Peña-Rodriguez*, 137 S. Ct. at 867 (describing acquittal of all 500 white defendants charged with killing African Americans in Texas in 1865-1866).

[9] Forman, *supra* note 8, at 915–16; *see also* W.E.B. Du Bois, *Black Reconstruction in America* 167–180 (1962).

[10] *See* Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. Rev. 1, 44 & nn.267–68 (1995); Colbert, *supra* note 6, at 79, 86–87.

### B. The States Innovated to Elude This Court's Decisions Combatting Post-Reconstruction Jury-Service Suppression.

After several decades in which African American jury participation reached a nadir, this Court recalibrated its willingness to look behind facially neutral justifications for decreased participation. In *Norris v. Alabama*, the Court considered two counties in which no witness could recall African Americans ever serving on juries. 294 U.S. 587, 591–92, 596–99 (1935).[11] Looking past Alabama's "general assertions" that it simply could not find qualified jurors, the Court determined to "inquire not merely whether [a federal right] is denied in express terms but also whether it was denied in substance and effect." *Id.* at 590, 598. Applying that more rigorous review, it invalidated the challenged conviction. *See id.* at 596, 599. Similarly, *Hill v. Texas* vacated a conviction obtained pursuant to a facially neutral practice of grand-jury commissioners summoning persons "with whom they were acquainted and whom they knew to be qualified to serve," where the commissioners for

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[11] *Norris* was one of this Court's "Scottsboro cases," in which nine Black youths were accused of raping two white women on a northern Alabama train. *See* Michael J. Klarman, *Scottsboro*, 93 Marq. L. Rev. 379, 379 (2009). In "hastily arranged trials," with the specter of lynching looming, eight were given death sentences. *See id.* at 379–81. By the time this Court heard *Norris*, one of the accusers had recanted, *see id.* at 401, and today it is accepted that the youths were innocent, *see id.* at 52 n.13, 79; John Edmond Mays & Richard S. Jaffe, *History Corrected–the Scottsboro Boys Are Officially Innocent*, Champion (Mar. 2014), https://www.nacdl.org/Champion.aspx?id=32656.

years "consciously omitted to place" any Black person's name on the jury list. 316 U.S. 400, 401–02, 04 (1942).

These cases did not make new law so much as reinvigorate old law. *See, e.g., id.* at 405 (relying on the rule laid down in 1881's *Neal v. Delaware*). But, rather than comply with the Court's new willingness to enforce the rights of potential jurors, states modified their discriminatory practices yet again.[12] One Southern attorney's response to *Norris* in the New York Times is emblematic: "[t]here are enough legal loopholes and human ingenuities on hand to keep [African Americans] excluded . . . for a long time to come."[13] The Charleston News and Courier flatly declared in an editorial that *Norris* would be "evaded," as the Fourteenth Amendment was "'not binding upon [the] honor or morals of the South.'"[14]

Two main tactics were employed. First, some states interpreted the new cases as simply prohibiting the total exclusion of Black persons from jury pools, and thus worked to ensure that some—but as few as possible—Black persons entered the jury pool. For example, in *Akins v. Texas*, Dallas County's grand-jury commissioners conceded that their "intentions were to get just one [African American] on the grand jury[.]" 325 U.S. 398, 406 (1945). Indeed, after *Hill*,

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[12] Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511, 556 (1994).

[13] *Id.* at 564 n.265 (quoting *Alabama Seeks End of Scottsboro Case*, N.Y. Times, Nov. 17, 1935, at D7).

[14] Klarman, *supra* note 11, at 410 (quoting various News and Courier editorials) (alteration in original).

for 21 successive panels between 1942 and 1947, Dallas County's grand juries had no more than one and sometimes no African Americans. *See Cassell v. Texas*, 339 U.S. 282, 293 (1950) (Frankfurter, J., concurring).

Second, deviation from the policy of total exclusion raised the specter of African American jurors slipping on to petit juries.[15] To address that eventuality, states began to lean on the discriminatory peremptory strike.

*Swain v. Alabama* illustrates this tactical shift. In the 1950s and early 1960s in Alabama's Talladega County, African Americans were still underrepresented on venires, likely because of efforts like those employed in Dallas County to limit their presence in the jury pool. *See* 380 U.S. 202, 205–06, 208. While petit jury venires did have an average of six to seven African Americans per venire, no African Americans actually served as petit jurors, including on Swain's petit jury. *See id.* at 205–06. The Court rebuffed Swain's challenge to the peremptory strike, emphasizing that tactic's "old credentials," and refusing to hold that striking African Americans "in a particular case" could deny equal protection. *Id.* at 212, 221. *Swain* suggested, however, that systematic peremptory use to remove African Americans "in case after case, whatever the circumstances" might raise constitutional concerns. *Id.* at 223.

In practice, that suggestion proved inadequate to prevent the discriminatory use of peremptory challenges over the next twenty-one years. *See, e.g.*,

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[15] Colbert, *supra* note 6, at 85 & n.424.

*Batson*, 476 U.S. at 103–04 (Marshall, J., concurring). In fact, only two defendants satisfied *Swain* during this period.[16] Observing that *Swain* had imposed a "crippling burden of proof," *Batson* overruled it, holding that a single peremptory strike can be challenged as discriminatory and developing a burden-shifting framework to guide the inquiry into the question of discrimination. *Batson*, 476 U.S. at 93–98.

### C. Jury Discrimination Remains Common After *Batson*.

*Batson* represented a significant step forward. But even as it was decided, Justice Marshall warned that it "w[ould] not end the illegitimate use of the peremptory challenge." *Id.* at 105 (Marshall, J., concurring). As he pointed out, it is easy to "assert facially neutral reasons for striking a juror," and if mere facial neutrality suffices to discharge the prosecution's burden, *Batson*'s "protection . . . may be illusory." *Id.* at 106; *see also Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*."). For this reason, sometimes courts must "look[] beyond the case at hand" to "all relevant circumstances" to resolve a *Batson* issue. *Miller-El*, 545 U.S. at 240.

Legal scholars and members of this Court have catalogued reams of evidence that "the discriminatory use of peremptory challenges remains a problem." *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring); *see*

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[16] Karen M. Bray, Comment, *Reaching the Final Chapter in the Story of Peremptory Challenges*, 40 U.C.L.A. L. Rev. 517, 530 n.63 (1992).

*id.* at 267–69 (collecting studies and evidence regarding persistence of discriminatory peremptory strikes). An article published this year reviewed seven published empirical studies that evaluated *Batson*, all of which "concur in the basic finding . . . that prosecutors disproportionately use peremptory strikes to exclude black jurors."[17]

To note just a subset of the evidence:

- A 2010 report by the nonprofit Equal Justice Initiative detailed the prevalence of the discriminatory peremptory, including common disingenuous "neutral" reasons for strikes and the lack of lasting consequences for prosecutors found to have violated *Batson*.[18] Mississippi's prosecutors have been repeated culprits.[19]
- A 2012 study examining peremptory strikes in capital trials of all defendants on North Carolina's death row as of July 1, 2010, found that "prosecutors struck eligible black venire members at about 2.5 times the rate" they struck non-Black eligible venire members.[20]

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[17] Frampton, *supra* note 7, at 1624 & n. 178 (collecting studies and other resources containing empirical findings on *Batson*)

[18] *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 16–18, 21, 24, 28 (Aug. 2010) (hereinafter "EJI Report"), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf.

[19] *See, e.g.*, *id.* at 20, 23–24, 28, 29 (Montgomery County).

[20] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1533 (2012).

- A 2017 study covering South Carolina capital cases between 1997–2012 found disproportionate strikes of Black potential jurors—"35% of black strike-eligible venire members" were excluded, compared to "12% of white strike-eligible venire members[.]"[21]
- A 2018 study, which covered 1306 North Carolina felony trials in 2011, found that prosecutors exercised peremptory strikes against Black jurors "at more than twice the rate that they excluded white jurors[.]"[22]
- Between 2011 and 2017, investigative journalists in Louisiana compiled a dataset pegged to over 5000 criminal trials in that state.[23] Their data shows that "prosecutors disproportionately strike black jurors no matter who they are prosecuting," and strike Black jurors more frequently when a Black person is the defendant.[24]
- A 2015 study using data collected from over 300 felony trials between 2003 and 2012 in Louisiana's Caddo Parish found that prosecutors struck Black jurors "at three

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[21] Ann M. Eisenberg et. al., *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. Rev. 373, 380 (2017).

[22] Ronald F. Wright et. al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1419, 1422, 1426 (2018).

[23] *See* Frampton, *supra* note 7, at 1620–21 (describing data set and study methodology).

[24] *Id.* at 1628.

> times the rate of [non-Black jurors]."[25] A study of 390 felony trials in Louisiana's Jefferson Parish between 1994 and 2002 also found that prosecutors struck Black prospective jurors at three times the rate they struck non-Black prospective jurors.[26]

These stark facts are now predictable. Just as "reliance solely on the good faith of prosecutors [was] misguided in light of the history of peremptory challenges in the period between *Swain* and *Batson*[,]"[27] it remains misguided in light of the history of strikes since *Batson*. If *Batson* is to have any meaning, the Court must continue to adhere to its promise in *Norris* to examine "not merely whether [rights were] denied in express terms but also whether [they were] denied in substance and effect." 294 U.S. at 590. An examination of all relevant facts shows that they were denied in Curtis Flowers' sixth trial.

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[25] Ursula Noye, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* 2 (Aug. 2015), https://perma.cc/EE7P-HUXJ.

[26] *See* Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 387 & nn. 146–147 (2012) (citing Richard Bourke, Joe Hingston & Joel Devine, La. Crisis Assistance Ctr., *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Jefferson Parish District Attorney's Office* (2003)).

[27] Brett M. Kavanaugh, Note, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187, 199 (1989).

## III. WINONA AND THE FIFTH JUDICIAL DISTRICT HAVE A LONG HISTORY OF DENYING AFRICAN AMERICANS EQUAL RIGHTS.

As in any case concerning purposeful discrimination, the context matters. *See Batson*, 476 U.S. at 93 (requiring "'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available'") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Here, that context is comprised in significant part by the history of racial discrimination in Winona and the Fifth Judicial District.

White residents of Winona and the Fifth Judicial District have long endeavored to deny African Americans full citizenship. These efforts—often led or facilitated by local officials—ranged from brutal violence and economic coercion to abuse of government power.

In 1937, a particularly heinous lynching in Winona spurred the United States House of Representatives to pass a rare anti-lynching bill.[28] After police arrested two African American men for the murder of a white man, a mob seized the men from the Winona courthouse and blow-torched them to death before a crowd of 300–400 men, women, and children.[29] According to an NAACP investigator, the

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[28] *The Congress: Black's White*, Time (Jan. 24, 1938), http://content.time.com/time/subscriber/article/0,33009,758933-2,00.html.

[29] Howard Kester, *Lynching by Blow Torch* 2-4 (Apr. 13, 1937), https://finding-aids.lib.unc.edu/03834/#folder_217#1.

sheriff and district attorney made no effort to identify or prosecute the murderers even though the abduction occurred in front of the district attorney and Mississippi's Secretary of State, and "[t]here are a thousand people in Montgomery County who can name the lynchers."[30] Based on his interviews, he observed that "[t]he citizens . . . seem[ed] rather well pleased with themselves."[31]

In 1955, 14-year-old Emmett Till met a similar fate. Following a train ride from Chicago, Mr. Till disembarked at the Winona station and traveled 30 miles east to his cousin's house.[32] While visiting his relatives, Mr. Till entered a local grocery store, and may have whistled at or near a white woman who worked there.[33] The woman took offense, and a few days later, her husband and friends kidnapped Mr. Till from his great uncle's home.[34] They proceeded to pistol-whip and shoot him before tying his neck to a gin fan with barbed wire and dumping him into the Tallahatchie River.[35] Two of the perpetrators were

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[30] *Id.* at 4, 7.

[31] *Id.* at 8.

[32] Jackson House, *This Boy's Dreadful Tragedy: Emmett Till as the Inspiration for the Civil Rights Movement*, 3 Tenor of Our Times, art. 4, 14-15 (2014).

[33] FBI, *Prosecutive Report of Investigation Concerning Roy Bryant, et al.* 6 (Feb. 9, 2006), https://static1.squarespace.com/static/55bbe8c4e4b07309dc53b00f/t/55c03e28e4b06f6d00a58d13/1438662184287/Emmett+Till+FBI+Transcript.pdf (hereinafter "FBI Report").

[34] *See id.*

[35] *See* House, *supra* note 32, at 17; Parker Yesko, *Acquitting Emmett Till's Killers*, Am. Pub. Media (June 5, 2018) (hereinafter "APM"),

charged with the murder and tried before an all-white jury.[36] Before jury deliberations occurred, "[e]very juror [was] visited by members of the [White Citizens'] Council to make sure they . . . voted 'the right way.'"[37] The jurors heeded the message and acquitted the defendants in an hour and five minutes.[38] "'If we hadn't stopped to drink pop,' one juror said in an interview, 'it wouldn't have took that long.'"[39]

The role of the White Citizens' Council in the Till trial represented one small part of its pro-segregation activities. From its inception in 1954 until the 1970's, the Council spearheaded white resistance to integration in Mississippi and much of the South. Dubbed the "uptown Klan" by Thurgood Marshall,[40] the Citizens Council was founded in Indianola, Mississippi just weeks after the Supreme Court decided *Brown v. Board of Education*.[41] Three months later, the group formed a state of association of councils headquartered in Winona.[42] The group's

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https://www.apmreports.org/story/2018/06/05/all-white-jury-acquitting-emmett-till-killers..

[36] *See* House, *supra* note 32, at 23 (citation omitted).

[37] FBI Report at 17 (citation omitted).

[38] *See* Yesko, *supra* note 35.

[39] *Id.*

[40] Southern Poverty Law Ctr., *Council of Conservative Citizens*, https://www.splcenter.org/fighting-hate/extremist-files/group/council-conservative-citizens (last visited Dec. 19, 2018).

[41] Jared A. Goldstein, *The Klan's Constitution*, 9 Ala. C.R. & C.L.L. Rev. 285, 344–45 (2018).

[42] *Citizen's Council/Civil Rights Collection 1954-1977, 1987-1992*, Univ. of S. Miss. – McCain Library & Archives,

founder, Robert Patterson, explained his reason for founding the Council as such: "Integration represents darkness . . . totalitarianism . . . and destruction. Segregation represents . . . the survival of the white race. These two ideologies are now engaged in mortal conflict and only one can survive."[43]

Funded by the State of Mississippi itself,[44] the Citizens' Council was largely composed of the white power structure: "bankers, merchants, judges, newspaper editors and politicians."[45] Indeed, its "titular spokesman" was Senator James Eastland,[46] and "the philosopher" of the group was Mississippi Supreme Court Justice Thomas Pickens Brady.[47] "Sanctioned by Mississippi's political elites, the state's White Citizens' Councils embarked on an oft-violent campaign to suppress civil rights agitation and to quell African American political participation. As one white Mississippian proclaimed: 'There's open

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http://lib.usm.edu/spcol/collections/manuscripts/finding_aids/m099.html (last visited Dec. 19, 2018).

[43] Thomas B. Edsall, *With "Resegregation," Old Divisions Take New Form*, Wash. Post (Mar. 9, 1999), https://www.washingtonpost.com/archive/politics/1999/04/09/with-resegregation-old-divisions-take-new-form/2bff9044-b356-4115-b11f-a9a156d1ec5c/?utm_term=.f8f7650031b2.

[44] *Citizen's Council / Civil Rights Collection*, *supra* note 42.

[45] Southern Poverty Law Ctr., *supra* note 40.

[46] Ruth Bloch Rubin & Gregory Elinson, *Anatomy of Judicial Backlash: Southern Leaders, Massive Resistance, and the Supreme Court, 1954-1958*, 43 Law & Soc. Inquiry 944, 964–65 (2018).

[47] Emily Prifogle, *Law and Local Activism: Uncovering the Civil Rights History of Chambers v. Mississippi*, 101 Cal. L. Rev. 445, 508 (2013).

season on the negroes now.'"[48] The group's presence was particularly strong in Winona. As a local election commissioner there explained, "You have to remember till about 1978, you couldn't get elected if you wanted to run for state representative unless you were approved by the White Citizens' Council."[49]

The Council did not act alone. The Winona Police also acted as violent, armed enforcers of segregation. In August 1960, an African American college student attempted to ride in the front of a bus from Atlanta to Jackson, Mississippi.[50] When the bus stopped in Winona, the sheriff and his deputy were waiting for the student.[51] They beat him with a blackjack and their fists and were joined by a group of white civilians.[52] After the beating, the officers arrested the victim on a charge of disturbing the peace.

The following year, the Winona police beat another African American man in the basement of the City Hall.[53] When the man's white, pro-segregation employer spoke to the police on his behalf, the police

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[48] Rubin & Elinson, *supra* note 46, at 964–65.

[49] Parker Yesko, *Letter from Winona: A year at the crossroads of Mississippi*," APM (May 1, 2018), https://www.apmreports.org/story/2018/05/01/winona-a-town-at-the-crossroads.

[50] John Herbers, *City Negro Beaten Up, Panel Told*, Delta Democrat-Times (Sept. 26, 1961), https://www.newspapers.com/image/21581794.

[51] *Id.*

[52] *Id.*

[53] Tom Scarbrough, Miss. State Sovereignty Comm'n, *Winona—Montgomery County*, Miss. Dep't of Archives & History (Feb. 23, 1962), https://bit.ly/2STDGYG.

beat the man a second time.[54] His employer then broached the matter with the FBI because "he wanted . . . to stop the whipping of his Negroes for apparently no reason at all."[55]

In June of 1963, the Winona police garnered national attention for their violent opposition to civil rights for African Americans. The police arrested Fannie Lou Hamer, a field secretary for the Student Nonviolent Coordinating Committee (hereinafter "SNCC"), and several of her colleagues after their bus stopped in Winona. A few bus riders had attempted to use the bathroom in a nearby restaurant, prompting the chief of police to expel Ms. Hamer's colleagues and arrest the entire group.[56] Ms. Hamer was taken to the county jail, where a state highway patrolman informed her, "[w]e are going to make you wish you was dead."[57] The officer then ordered two inmates to beat her with a blackjack until they stopped from exhaustion.[58] Ms. Hamer was left with permanent damage to her kidney and a blood clot in the artery of her left eye.[59] One of Ms. Hamer's out-of-town colleagues from SNCC called the Winona police station to ask how he could secure bail for the group

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[54] *See id.*

[55] *See id.* at 5.

[56] Fannie Lou Hamer, Testimony Before the Credentials Committee, Democratic National Convention, Atlantic City, New Jersey, APM: Say It Plain Series (Aug. 22, 1964), http://americanradioworks.publicradio.org/features/sayitplain/flhamer.html.

[57] *Id.*

[58] *Id.*

[59] Janice Hamlet, *Fannie Lou Hamer: The Unquenchable Spirit of the Civil Rights Movement*, 26 J. of Black Studies 560, 565 (1996).

and was told to come to the station in person.[60] Upon his arrival, he was arrested for "disturbing the peace" and then subjected to a four-hour beating by the local police, the sheriff, and the mayor of Winona.[61] The police then charged him with the murder of two men whom he did not know.[62]

The next year, Ms. Hamer spoke at the Democratic National Convention, using her experience at the hands of the Winona police to emphasize the importance of voting rights;[63] however, national attention failed to stop the Winona police or quell the anti-Black violence. In 1965, the Sheriff asked a landlord to evict local civil rights workers from their house.[64] When the owner failed to do so, four men fired shots into the house.[65]

The following year, a different city in the Fifth Judicial District captured national attention for its anti-Black violence: Grenada, where Doug Evans' office is located and where Mr. Evans was then a

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[60] Stavis, *supra* note 5, at 652 n.263.

[61] *Id.*

[62] *Id.* at 653 n.263.

[63] Nicholas Targ, *Human Rights Hero Fannie Lou Hamer (1917-1977)*, Hum. Rts., Spring 2005, at 25-6. At the time, only 6.7% of nonwhite Mississippians were registered to vote—a number that was orders of magnitude lower than any other Southern state. *U.S. Comm'n on Civil Rights, Political Participation* 222 (1968).

[64] *Incident Summary – Mississippi, Student Nonviolent Coordinating Committee*, Lucile Montgomery Papers, 1963-1967; Freedom Summer Digital Collection, Univ. of Wis. (Jan. 1965), http://content.wisconsinhistory.org/cdm/ref/collection/p15932coll2/id/35295.

[65] *See id.*

senior in high school. At the time, Grenada was known as a "segregation stronghold," and only 3% of African American residents were registered to vote.[66] After James Meredith's March Against Fear passed through town in June of 1966, African American residents of Grenada spent the summer marching peacefully for their rights while white residents assaulted them. The police stood by or used their powers to arrest and harass African American protesters.[67] The New York Times described one representative march as follows: "Civil rights demonstrators were pelted with bricks, bottles and firecrackers tonight while state and local law-enforcement officials stood by, laughing and chuckling."[68]

White segregationists ratcheted up their violent defense of Jim Crow later that summer after a federal court ordered Grenada to integrate its public schools. On the first day of school, white mobs led by the KKK surrounded the elementary and high schools while pick-up trucks equipped with two-way radios scoured the streets for African-American schoolchildren who could be targeted.[69] The mob beat the children with various weapons, and initially barred more than half of African American children from reaching the

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[66] Bruce Hartford, *Grenada Mississippi—Chronology of a Movement* (1967), https://www.crmvet.org/info/grenada.htm.

[67] *See generally id.*

[68] Gene Roberts, *White Mob Routs Grenada Negroes*, N.Y. Times (Aug. 10, 1966), https://timesmachine.nytimes.com/timesmachine/1966/08/10/issue.html?action=click&contentCollection=Archives&module=ArticleEndCTA&region=ArchiveBody&pgtype=article.

[69] *See* Hartford, *supra* note 66.

school.[70] When the school day ended, "[a] throng of angry whites wielding ax handles, pipes and chains" greeted the departing students and beat them further.[71]

White Grenada residents failed to halt integration, but violent harassment continued. As detailed in a 1966 letter from LDF attorneys to the parents of African American students in Grenada schools, "your children . . . have been subject to all sorts of violence, intimidation, and abuse," including white students who "bring knives, brass knuckles, and other weapons to school," and teachers who "call[] them 'niggers,'" and "explicitly urge[] the white students to inflict physical harm on the Negro students."[72]

The Grenada city government—including the police department where Doug Evans worked as an officer in the 1970s—also brazenly defied federal civil rights laws.[73] In 1977, the Northern District of Mississippi enjoined the city from continuing its racially discriminatory hiring, training, and promotion practices. The city's response did not honor

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[70] *See id.*

[71] AP, *Grenada Negroes Beaten at School*, N.Y. Times (Sept. 13, 1966), https://timesmachine.nytimes.com/timesmachine/1966/09/13/79311321.html?action=click&contentCollection=Archives&module=ArticleEndCTA&region=ArchiveBody&pgtype=article&pageNumber=1.

[72] Letter from Paul Brest, Miriam Wright, and Iris Brest to parents (Dec. 20, 1966), https://www.crmvet.org/docs/6612_grenada_parents-letter.pdf.

[73] *Neely v. City of Grenada*, 438 F. Supp. 390, 408 (N.D. Miss. 1977).

the spirit of the injunction. Grenada hired more African American police officers, but the police department forbade them from arresting white residents.[74] If an African American officer pulled over a white driver for violating the law, he was required to call a white officer to address the situation.[75]

Overt discrimination reminiscent of the Jim Crow era persists in Mississippi's Fifth Judicial District today. As de jure segregation ended, membership in the White Citizens' Council waned. Then, in 1985, Gregory Baum, an ex-field director from the Citizens' Council formed a new organization from the membership lists of the old organization: the Council of Conservative Citizens (hereinafter "CCC"). The CCC shared its white supremacist DNA with the old Citizens' Councils, but it shifted its focus to the dangers of "race-mixing"—an act of "rebelliousness against God,"[76] per the group's website—and "black-on-white crime," which has been a particular fascination of the CCC.[77] In the view of Baum, whose organization has called African Americans a "retrograde species of humanity,"[78] "[i]t's almost an open war on whites."[79]

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[74] *In the Dark Season Two, Episode 8: The D.A.*, APM Reports (June 12, 2018).

[75] *See id.*

[76] Southern Poverty Law Ctr., *supra* note 40.

[77] Donna Ladd, *From Terrorists to Politicians, the Council of Conservative Citizens Has a Wide Reach*, Jackson Free Press (June 22, 2015), http://www.jacksonfreepress.com/news/2015/jun/22/terrorists-politicians-council-conservative-citize/.

[78] Southern Poverty Law Ctr., *supra* note 40.

[79] *See* Ladd, *supra* note 77.

Like its predecessor the Citizens' Council, the CCC has attracted considerable support from Winona-area politicians. In 1991, Doug Evans—who has been described as a "racist white supremacist" by the former mayor of his hometown[80]—delivered the keynote address at a CCC meeting in Webster County.[81] The following year, he attended a CCC speech on "the historical background of the 'civil rights movement'" given by Robert Patterson, the founder of the White Citizens Council, and also spoke at the event.[82] In addition, Mr. Evans campaigned that year at the CCC-sponsored Black Hawk Political Rally. The rally benefited the Black Hawk Bus Association, which transported white children to a segregation academy that had been created in response to the integration of the local schools.[83]

Other politicians representing the Fifth Judicial District have also spoken at CCC events. At a minimum, former state representatives Dannie Reed and Bobby Howell, current state representative Jim Beckett, former Mississippi Supreme Court Justice Kay Cobb (who sat on *Flowers v. Mississippi*, 947 So.

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[80] Paul Alexander, *For Curtis Flowers, Mississippi Is Still Burning*, Rolling Stone (Aug. 7, 2013), https://www.rollingstone.com/politics/politics-news/for-curtis-flowers-mississippi-is-still-burning-188496/.

[81] *See id.*

[82] *See id.*; *see also* Alan Bean, *Doug Evans and the Mississippi Mainstream*, Friends of Justice (Oct. 20, 2009), https://friendsofjustice.blog/2009/10/20/doug-evans-and-the-mississippi-mainstream/.

[83] Parker Yesko, *The rise and reign of Doug Evans*, APM (June 26, 2018), http://explorerproducer.lunchbox.pbs.org/blogs/pmp/the-rise-and-reign-of-doug-evans/.

2d 910 (Miss. 2007)), and current state senators Gary Jackson and Lydia Chassaniol have all spoken at CCC events.[84] In 2009, Chassaniol, who is a CCC member, "gave a rabble-rousing speech on 'Cultural Heritage in Mississippi'" to the group's national convention.[85]

In 2012, the CCC came to the attention of Dylann Roof. Following George Zimmerman's trial for the killing of Trayvon Martin, Roof googled "black on White crime."[86] The first website he found was the Council of Concerned Citizens, and, in his words, "I have never been the same since that day."[87] "There were pages and pages of these brutal black on White murders. . . . At this moment I realized that something was very wrong."[88] Roof proceeded to murder nine African American congregants while they prayed in church three years later.[89] The CCC condemned Roof's violence but not his views. Its president, Earl Holt III, issued a statement that noted:

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[84] Southern Poverty Law Ctr., *Dozens of Politicians Attend Council of Conservative Citizens Events, Intelligence Report* (Oct. 14, 2004), https://www.splcenter.org/fighting-hate/intelligence-report/2004/dozens-politicians-attend-council-conservative-citizens-events; Southern Poverty Law Ctr., *supra* note 40.

[85] *See id.*

[86] *Dylann Roof's Manifesto*, N.Y. Times (Dec. 13, 2016), https://www.nytimes.com/interactive/2016/12/13/universal/document-Dylann-Roof-manifesto.html.

[87] *Id.*

[88] *Id.*

[89] Alan Blinder & Kevin Sack, *Dylann Roof Is Sentenced to Death in Charleston Church Massacre*, N.Y. Times (Jan. 10, 2017), https://www.nytimes.com/2017/01/10/us/dylann-roof-trial-charleston.html.

> It has been brought to the attention of the Council of Conservative Citizens that Dylann Roof—the alleged perpetrator of mass murder in Charleston this week—credits the CofCC website for his knowledge of black-on-white violent crime. This is not surprising: The CofCC is one of perhaps three websites in the world that accurately and honestly report black-on-white violent crime, and in particular, the seemingly endless incidents involving black-on-white murder.[90]

Rampant affiliation with the CCC is not the only sign that Winona's politicians have failed to move beyond the area's troubled history. Last year, Bobby Howell's replacement as state representative, Karl Oliver, took to Facebook after learning that Louisiana intended to remove some Confederate statues.[91] Oliver, who also represents the town where Emmett Till was lynched, responded: "If the . . . 'leadership' of Louisiana wishes to, in a Nazi-ish fashion . . . destroy historical monuments of OUR HISTORY, they should be LYNCHED!"[92]

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[90] Ladd, *supra* note 77.

[91] Arielle Dreher, *State Rep. Karl Oliver Calls for Lynching over Statues, Later Apologizes*, Jackson Free Press (May 21, 2017), http://www.jacksonfreepress.com/news/2017/may/21/report-mississippi-rep-karl-oliver-calls-lynching-/.

[92] *Id.*

## IV. DOUG EVANS HAS A HISTORY OF DISCRIMINATING AGAINST AFRICAN AMERICAN JURORS, AND THAT PATTERN OF DISCRIMINATION HAS PERSISTED THROUGHOUT MR. FLOWERS' TRIALS.

### A. Mr. Evans' Office Strikes African American Jurors at a Much Higher Rate Than White Jurors.

A detailed statistical analysis conducted by American Public Media Reports (hereinafter "APM Reports") demonstrates that Doug Evans and the office he runs have systematically denied African Americans the right to serve as jurors throughout his 25 years in office. APM Reports gathered court records for all 418 trials conducted by Mr. Evans and his office since he was elected District Attorney.[93] For 225 trials, involving 6,763 potential jurors, APM Reports was able to collect race data.[94] The data revealed a marked disparity in the prosecution's use of peremptory challenges. Overall, the State struck 49.81% of prospective African American jurors and 11.21% of white jurors.[95] In other words, Mr. Evans' office struck African American jurors *4.4 times* more frequently than white jurors.

APM Reports attempted to analyze the data in myriad ways to find a geographical area, type of case, or circumstance in which African Americans were not

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[93] Will Craft, *Peremptory Strikes in Mississippi's Fifth Circuit Court District*, at 3, APM Reports, https://www.apmreports.org/files/peremptory_strike_methodology.pdf (last visited Dec. 19, 2018).

[94] *Id.* at 5.

[95] *Id.* at 6.

struck at a significantly higher rate than whites. They failed. African Americans were struck more frequently in every county in the Fifth Judicial District.[96] They were struck more frequently in trials for minor crimes and more frequently in trials for serious crimes.[97] When the defendant was white, Doug Evans' office struck African American jurors more frequently.[98] But, when the defendant was Black, the rate of strikes against Black jurors more than doubled as compared to white defendant cases.[99]

In 89 cases, APM Reports was also able to get full trial transcripts and code jurors' answers to different questions to determine whether their answers suggested a nonracial explanation for this pattern of strikes. It did not. To the contrary, when APM Reports controlled their regression analysis for the answers given, the influence of race increased. Simply being African American increased a jurors' chances of being struck by Doug Evans or his office 6.67 times—a much greater effect than even knowing the defendant or having a family member in law enforcement.[100]

### B. Doug Evans' Actions Throughout the Six Curtis Flowers Trials Reveal an Intent to Remove as Many African-American Jurors as Possible.

Both in and outside the courtroom, Doug Evans has worked feverishly to ensure that an all- or

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[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 10.

predominantly-white jury decides whether African American Curtis Flowers committed a quadruple murder with three white decedents and very weak evidence.[101] In Mr. Flowers' first trial, Doug Evans obtained an all-white jury by using five peremptory challenges on African American jurors.[102] The jury convicted Mr. Flowers after deliberating for 66 minutes.[103] In Mr. Flowers' second trial, Mr. Evans again attempted to strike every African American juror; however, the trial judge determined that one of the strikes was discriminatory and ordered that Mr. Evans keep the juror. The resulting jury had eleven white members and one African American.[104] It, too, convicted Mr. Flowers.

In the third trial, Mr. Evans again attempted to remove every African American from the venire. He used all fifteen of his strikes—twelve peremptory challenges and three alternate challenges—on African Americans, yielding a jury with just one African American. This jury also convicted Mr. Flowers, but the Mississippi Supreme Court recognized that Mr. Evans' strikes reflected "as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge."[105] It reversed Mr. Flowers' conviction, finding that two of

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[101] *See generally* Pet. for Writ of Cert., *Flowers v. Mississippi*, No. 17-9572 (June 21, 2018).

[102] Clerk's Papers (hereinafter "CP") at 1656.

[103] *In the Dark Season Two: The Trailer* (Apr. 16, 2018), https://www.apmreports.org/story/2018/04/16/in-the-dark-season-two-trailer.

[104] *See* CP at 1662.

[105] *Flowers v. Mississippi*, 947 So. 2d 910, 935–36 (Miss. 2007).

Mr. Evans' strikes were clearly motivated by race and three others were suspicious.[106]

Following consecutive trials in which courts had found that he eliminated African American jurors because of their race, Mr. Evans proceeded to use all eleven of the peremptory challenges he exercised to strike African Americans at Mr. Flowers' fourth trial. This time, however, the panel's racial balance more closely represented the demographics of Montgomery County, and five African American jurors were seated. The five African American jurors voted unanimously to acquit, the seven white jurors all voted to convict, and the judge declared a mistrial.

Nearly the same thing happened in the fifth trial. Mr. Evans used all but one of his strikes on African American jurors, and the jury hung, with an African American juror as the sole hold out.[107] At this point, Mr. Evans had garnered convictions each time he had limited the jury to one African American or fewer, and he had failed to secure convictions when more than one African American juror was seated.

When the fifth trial adjourned, the trial judge detained the sole holdout and harangued him in open court.[108] The judge ordered the bailiffs to arrest the juror, claiming—with no apparent factual basis—that he had lied during voir dire.[109] Mr. Evans then pursued the prosecution of the juror who had

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[106] *Id.* at 936.
[107] CP 1891; *The Trials of Curtis Flowers*, APM Reports (June 5, 2018), https://www.apmreports.org/story/2018/06/05/in-the-dark-s2e7.
[108] *See id.*
[109] *See id.*

thwarted his latest effort to convict Mr. Flowers, resisting calls to recuse himself because of a conflict for the next eight months.[110] Once Mr. Evans finally recused himself, the Mississippi Attorney General's office assumed responsibility for the prosecution and asked the court to dismiss the charges.[111] The juror's attorney explained the effect of the arrest: "It was a completely bogus charge. I believe [the juror] was indicted to send a message to future jurors who vote for acquittal."[112]

Doug Evans also pursued a second path to reducing the odds that African Americans would serve on the sixth trial: in consultation with Judge Loper, Mr. Evans approached two local politicians with ties to the Council of Concerned Citizens—state senator Lydia Chassaniol and state representative Bobby Howell—and asked them to submit legislation that would permit him to try Mr. Flowers' case outside of the racially diverse confines of Montgomery County.[113] Both politicians obliged. Representative Howell introduced House Bill No. 302, which empowered prosecutors to seek a change of venue to a new county "if [they] cannot have a fair and impartial

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[110] *See id.*

[111] *See id.*

[112] Lacey McLaughlin, *Majority White Jury in Flowers Trial*, Jackson Free Press (June 11, 2010), http://www.jacksonfreepress.com/news/2010/jun/11/majority-white-jury-in-flowers-trial/.

[113] Monica Land, *Sixth trial set in Winona murders*, Grenada Star (Sept. 22, 2009), https://www.grenadastar.com/2009/09/22/sixth-trial-set-in-winona-murders/.

trial in the county" where the crime was charged.[114] Senator Chassaniol introduced Senate Bill 2069, which would permit the prosecution to seek a jury "from the entire circuit court district" if three specific conditions were met: a previous trial, a previous mistrial, and an unsuccessful attempt by the court to seat an impartial jury.[115] Because five of the six remaining counties in the Fifth Judicial District have a higher population of white residents than Montgomery County, the effect of both bills would be the reduction of African Americans in the jury pool for any future trial.[116]

Although neither bill was enacted by the legislature, Doug Evans still obtained another predominantly-white jury in the sixth Curtis Flowers trial. In this iteration, Mr. Evans accepted the first African American juror presented and struck the remaining five.[117] Thus, Mr. Evans ended up with eleven white jurors out of a venire that had been 42% African American before peremptory and for-cause challenges were issued.[118] This predominantly-white

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[114] H.B. 302, Reg. Sess. 2009 (Miss. 2009), http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0300-0399/HB0302IN.pdf. Under current Mississippi law, only defendants may request change in venue. *See* Miss. Code Ann. § 99-15-35.

[115] Comm. for S.B. 2069, Reg. Sess. 2009 (Miss. 2009), http://billstatus.ls.state.ms.us/documents/2009/pdf/SB/2001-2099/SB2069PS.pdf.

[116] *Mississippi White Population Percentage, by County* (2013), https://www.indexmundi.com/facts/united-states/quick-facts/mississippi/white-population-percentage#map.

[117] *Flowers v. Mississippi*, 158 So. 3d 1009, 1046 (Miss. 2014).

[118] *Id.* at 1089 (King, J., dissenting).

jury convicted Mr. Flowers of the four homicides in 29 minutes.[119]

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[119] Dave Mann, *Did jury makeup decide Curtis Flowers' fate and send him to death row?*, Clarion Ledger (June 24, 2018), https://www.clarionledger.com/story/news/2018/06/24/race-jurors-predicted-outcome-curtis-flowers-trial-analysis/726802002/.

## CONCLUSION

One hundred and forty three years after the enactment of the Civil Rights Act of 1875, prosecutors continue to deny African Americans the right to serve on juries—particularly in Mississippi's Fifth Judicial District. This Court should reaffirm its commitment to the eradication of jury discrimination and require that lower courts give serious scrutiny to all indicia of discrimination—history, statistics, and implausible justifications, among others. Unless this Court requires a more searching *Batson* inquiry than that employed by the lower courts in this case, African Americans will continue to be unequal citizens in this country.

Petitioner's conviction and death sentence should be reversed.

Respectfully submitted,

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